Supreme Court, U.S.
FILED

02-14 11 MAR 21 2003

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No. 02-

IN THE

Supreme Court of the United States

THE BOEING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.* BRETT ROBY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR CERTIORARI

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167 pp

QUESTIONS PRESENTED

1. Whether the government can hold a contractor liable under the False Claims Act for damages for the loss of a helicopter due to a defective part, notwithstanding that the government, pursuant to a federally-mandated contract clause, expressly relieved the contractor of liability for loss of or damage to government property resulting from defects or deficiencies in the goods supplied.

2. Whether the court below erred in holding, in conflict with the United States Court of Appeals for the Fifth Circuit, that damages recoverable under the False Claims Act, before trebling, are not limited "to the amount wrongfully paid to satisfy the false claim," *United States* v. *Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972).

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it has no parent corporation and no other publicly held corporation owns more than 10% of petitioner's stock.

All parties to the proceeding are listed in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner the Boeing Company ("Boeing") respectfully requests that this Court grant its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 302 F.3d 637 (6th Cir. 2002), and appears in the Appendix to this petition ("App.") at 1a-26a. The unpublished order of the court of appeals denying the petition for rehearing and rehearing *en banc* appears at App. 103a. The orders of the district court under review are published at 73 F. Supp. 2d 897 (S.D. Ohio 1999) and at 79 F. Supp. 2d 877 (S.D. Ohio 1999), and are reproduced at App. 65a-96a and 27a-64a. The district court's unpublished order certifying an appeal to the court of appeals pursuant to 28 U.S.C. § 1292(b) appears at App. 99a-102a, and the unpublished order of the court of appeals accepting certification appears at App. 97a-98a.

JURISDICTION

The court of appeals entered judgment on September 12, 2002, and denied a timely petition for rehearing and rehearing en banc on January 24, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF STATUTORY AND REGULATORY LAW

The relevant provision of the False Claims Act is codified at 31 U.S.C. § 3729, and is reproduced at App. 104a-106a. The relevant provisions of the Federal Acquisition Regulations are codified at 48 C.F.R. §§ 46.802-46.803 and 52.246-24, and are reproduced at App.111a-112a and 124a-126a.

STATEMENT OF THE CASE

This case presents two important questions of federal law that divide the lower courts and have broad ramifications for the allocation of risk and liability in government contracting. First, the United States Court of Appeals for the Sixth Circuit held that the standard limitation-of-liability clause for high-value items in government contracts set forth in the Federal Acquisition Regulations ("FAR") does not apply to limit liability for damages under the False Claims Act ("FCA"). App. 8a-14a. This ruling is in conflict with decisions of other circuits that hold that there is no implied FCA exemption from limitation-of-liability or other clauses in government contracts. This ruling also contravenes the text and history of the regulation, threatens the federal policy of reducing the government's procurement costs through self-insurance, and upsets reliance interests by shifting massive business risks associated with high-value civil and defense procurement from the government to private industry.

Second, the Sixth Circuit held that damages recoverable under the FCA, before trebling, are not limited by the total amount the government paid on the claim alleged to be false. Specifically in this case, which involved a contract to retrofit existing helicopters with upgraded components, the court held that the government's damages would be measured by the full value of a helicopter that was lost due to a defective part, an amount far in excess of the claim submitted by Boeing for the upgrade work. App. 18a-19a. This ruling directly conflicts with the rule established in *United States* v. *Aerodex, Inc.*, 469 F.3d 1003 (5th Cir. 1972), and recently recognized by this Court in *Cook County* v. *United States ex rel. Chandler*, No. 01-1527, 2003 WL 890268 (U.S. Mar. 10, 2003), that consequential damages – defined in *Aerodex* as "additional losses" beyond the amount the government "wrongfully paid," 469 F.3d at 1011 – are not recoverable under the FCA.

Background

1. The FAR are prescribed and administered "jointly by the Secretary of Defense, the Administrator of General Services, and the [NASA] Administrator," and govern the acquisition by contract of supplies and services throughout the federal government. 48 C.F.R. §§ 1.103(b), 1.104. It is the declared policy of the FAR that "[t]he Government will generally act as a self-insurer by relieving contractors, as specified in this subpart, of liability for loss of or damage to property of the Government" from defective supplies or services. *Id.* § 46.803(a).

The FAR prescribe mandatory limitation-of-liability clauses for inclusion in various kinds of government contracts. The most important of these is at issue in this case: the High-Value Item Clause, or HVIC. *Id.* § 52.246-24(a). A "high-value item" is a designated "contract end item that ... has a high unit cost (normally exceeding $100,000 per unit), such as an aircraft, an aircraft engine, a communication system, a computer system, a missile, or a ship." *Id.* § 46.802. The HVIC specifically provides, subject to enumerated exceptions, that:

> notwithstanding any other provision of this contract, the Contractor shall not be liable for loss of or damage to property of the Government (including the supplies delivered under this contract) that (1) occurs after Government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies.

Id. § 52.246-24(a). The only defects or deficiencies excluded from the limitation of liability are those resulting from "willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel," a term defined to

encompass only the most senior management of the company. *Id.* § 52.246-24(b).[1]

The policy of government self-insurance embodied in the HVIC dates back to World War II. As the volume of procurement and hence insurance costs expanded dramatically during wartime, the military began self-insuring (1) to obviate the need for contractor insurance and thus reduce the proper pass-through costs to the government of insurance premiums, and (2) to encourage contractors to cooperate fully in investigating the causes of accidents. *Australia* v. *Lockheed Aircraft Corp.*, No. 69-1623-WPG, 1972 U.S. Dist. LEXIS 15742, at *2 (C.D. Cal. Jan. 10, 1972), C.A. J.A. 388-89; 4 U.S. Comm'n on Gov't Procurement, *Report of the Commission on Procurement* 96 (1972) ("*Commission Report*"), C.A. J.A. 406 (noting that government payment of contractor insurance costs would be more expensive than self-insurance because premiums reflect not only the government's loss experience but also administrative costs and insurer profit). Thus, in the postwar era "the general practice of Government in military contracting was to accept risk for loss or damage except for the warranted item that was defective." *Commission Report* at 92, C.A. J.A. 402.

To bring certainty and uniformity to government practice, the Department of Defense in 1971 issued Armed Service Procurement Regulations ("ASPR") that were "aimed at reducing Government procurement costs by limiting the contractor's risk." *Defense Procurement Circular 86* ("DPC 86"), at 1 (1971), C.A. J.A. 434. One ASPR provision,

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[1] Under the HVIC, "Contractor's managerial personnel" means the Contractor's directors, officers, or managerial personnel who supervise or direct "all or substantially all of the Contractor's business"; "all or substantially all of the contractor's operations" at a plant, laboratory, or separate location for performance of the contract; or "[a] separate and complete major industrial operation connected with the performance of this contract." 48 C.F.R. § 52.246-24(b).

entitled "Limitation of Liability for Defects – Major Items," prescribed a standard contract clause for all high-value items, ASPR § 7-104.45(b) (1974), C.A. J.A. 485-86, and was the prototype HVIC regulation. In issuing the regulation, the Department of Defense noted that the limitation-of-liability "policy and the clauses prescribed by this item are worded in terms of liability arising from supplies delivered to the Government," and that "no distinction is made between liability founded in contract and in tort." DPC 86, at 2, C.A. J.A. at 435; *Commission Report* at 96, C.A. J.A. at 406 (express repair/replacement remedies in the clause are "exclusive" remedies for wrongs "both in contract and tort").

The original HVIC set forth in DPC 86 excluded from its liability protection product defects resulting from two kinds of contractor conduct: (1) "fraud or gross negligence as amounts to fraud, on the part of any personnel of the Contractor," and (2) willful misconduct and bad faith on the part of the Company's high management. ASPR § 7-104.45(b) (1971), *in* DPC 86, at 3, C.A. J.A. 437. The first of these exclusions drew protest from defense industry representatives, who explained in comments upon the rule that if a contractor were potentially liable for the fraud of any personnel, the business risk would be "more than any prudent management would be willing to accept without the protection of substantial liability insurance." *ASPR Coverage of Warranties and Consequential Damages* 4, *attached to* Letter from Council of Defense and Space Industry Associations, to Captain E.C. Chapman, Chairman, ASPR Committee (Aug. 12, 1971), C.A. J.A. 464. "[T]he introduction of this exception goes a long way to negating the main purpose of DPC 86" by raising a "serious question whether DPC 86 implementation would have any real effect upon the cost of Contractor insurance included in the overall cost of the Government procurement program." *Id.* at 5, C.A. J.A. 465. The Department responded by deleting the general fraud exception from the HVIC in reissuing the regulation in

1974. ASPR § 7-104.45(b) (1974), C.A. J.A. 485-86; Memorandum from the Department of the Air Force, to the Chairman, ASPR Committee 3 (Jan. 14, 1972), C.A. J.A. 652 (noting that deleting this exception "would eliminate contractor's responsibility for damage to Government property resulting from defective items and caused by the fraud or gross negligence as amounts to fraud of any personnel of the contractor").

The HVIC, without substantive change as to its scope, was subsequently incorporated into the FAR, 46 Fed. Reg. 40,221 (Aug. 7, 1981), and now also extends to certain nondefense government contracts. 48 C.F.R. § 46.801(a). Accordingly, from at least 1974 to the present, the loss or damage to government property from product defects for which a government contractor is liable under the HVIC (and indeed under many other limitation-of-liability clauses under the FAR)[2] are only those that arise from "willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel." *Id.* § 52.246-24(b).[3]

2. The False Claims Act was first enacted in 1863 "with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000) (bracket in original) (quoting *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976)). "[T]he False Claims Act was not designed to reach every kind of fraud practiced on the Government," *United*

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[2] *See, e.g.*, 48 C.F.R. §§ 52.246-23(b) (defects in supplies not subject to the HVIC), 52.246-25(b) (defects in services), 252.228-7001(b) ("damage to, or loss or destruction of aircraft in the open, during operation, and in flight" prior to delivery to the government), 52.245-2(g) (loss or destruction of government-furnished property in the hands of the contractor), and 52.245-8(c) (loss of or damage to government facilities).

[3] The re-promulgation of section 52.246-24 in 1997 did not amend the HVIC in any way that is material here. *See* 61 Fed. Reg. 67,408, 67,426 (Dec. 20, 1996).

States v. *McNinch*, 356 U.S. 595, 599 (1958), but was enacted with the specific purpose "to stop this plundering of the public treasury," *id.*, and "to protect the funds and property of the Government *from fraudulent claims*." *Rainwater* v. *United States*, 356 U.S. 590, 592 (1958) (emphasis added). The FCA created a statutory remedy for fraudulently obtaining money and property that supplemented the common law. *United States* v. *Mead*, 426 F.2d 118, 123 n.4 (9th Cir. 1970); *United States* v. *Borin*, 209 F.2d 145, 148 (5th Cir. 1954).

As amended, section 2(a) of the FCA creates civil liability for any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval," or who makes certain false statements or engages in other defined conduct to obtain fraudulently the money or property of the government. 31 U.S.C. § 3729(a). The scienter required under the current FCA is less than that required for common law fraud; the term "knowingly" is defined to include not only actual knowledge of the relevant information and deliberate ignorance, but also "reckless disregard of the truth or falsity of the information." *Id.* § 3729(b).

From its inception, the FCA allowed recovery of damages sustained from the prohibited acts in order "to provide for *restitution to the government of money taken from it by fraud*," and authorized doubling of those damages "to make sure that the government would be made completely whole." *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551-52 (1943) (emphasis added). It had long been held, however, that any "additional losses" sustained by the government beyond what it "wrongfully paid" were not within the purview of the Act. *Aerodex*, 469 F.3d at 1011. As this Court has recognized, during the 1986 revisions of the Act, a provision of the House bill that purported to overrule the *Aerodex* rule and provide for the recovery of such

"consequential damages" was rejected in the House-Senate conference. *Cook County*, 2003 WL 890268, at *7 & n.9; *infra* at 26-28. Congress opted instead to provide for the trebling of damages "as a substitute for consequential damages." *Cook County*, 2003 WL 890268, at *7 n.9. Accordingly, the FCA, as amended, limits recovery to "3 times the amount of damages which the Government sustains *because of the [prohibited] act*." 31 U.S.C. § 3729(a) (emphasis added).

Facts and Proceedings Below

1. Boeing has long supplied helicopters to the United States military. In the 1970's, Boeing commenced research and development of a "next-generation" alloy to allow the manufacture of extremely durable helicopter gears that would extend service lives and withstand harsh battlefield conditions (including loss of engine lubrication). Boeing succeeded in developing that technology, which has been incorporated in, among other products, the Army's Chinook 47 ("CH-47") line of military airlift helicopters.

In 1985 and 1989, Boeing entered into two contracts with the Army to upgrade certain components and systems of the Army's CH-47 helicopters to a more advanced "D-Model" configuration. This task involved modernizing flight control, hydraulic, electrical, and drive systems (including redesigned transmissions). The Army requested that Boeing rely on two sources to manufacture the helicopter gears, and, after a rigorous qualification process, the Army approved the Speco Corporation as one of those sources. Because the hardness of the new advanced alloy posed significant challenges in machining the gears, Boeing set up an elaborate (and government-approved) quality assurance process at Speco that numerous witnesses testified without contradiction was unprecedented in its stringency. Army inspectors were deeply involved in this process.

Among the 359 remanufactured helicopters that Boeing upgraded was No. 89-0165. Boeing invoiced the government

$4.1 million for the upgrade of this helicopter in 1990. In 1991, this helicopter made an emergency landing in Saudi Arabia during Operation Desert Storm. None of the crew suffered any serious injury, but the helicopter and its contents were destroyed in an ensuing fire. A joint Boeing-Army study later determined that the cause of the mishap was a previously undetected microscopic manufacturing defect in a gear made by Speco.

2. In 1997, the United States intervened in a *qui tam* action filed in the United States District Court for the Southern District of Ohio under the FCA by relator Brett Roby, a former Speco employee. The government's amended complaint alleged that Boeing installed nonconforming Speco-made gears in Army helicopters in reckless disregard of information that the gears might contain microscopic manufacturing defects, and that Boeing therefore submitted false claims for payment because the claims certified contract compliance. App. 8a ("The allegedly fraudulent act in this case is Boeing's 'false[] represent[ation] that the helicopters conformed to contract requirements and fail[ure] to disclose their faulty manufacture to the United States Government.'" (alterations in original) (quoting Am. Compl. at ¶ 3)). The allegations of recklessness centered upon the response of Boeing quality-assurance personnel to information about certain manufacturing processes employed by Speco. For the lost Saudi helicopter, the government claimed damages in excess of $38 million (treble the value of a new CH-47D helicopter). *Id.* at 31a & n.7.

As the court of appeals noted, Boeing "'vigorously denies' any knowing submission of a false claim in this case," App. 8a n.3, but those fact issues were never tried. On cross-motions for partial summary judgment, the district court first ruled that the HVIC did not operate to restrict liability for damages under the FCA. *Id.* at 90a-95a. On the issue of damages, the district court held that consequential damages were unavailable under the FCA. *Id.* at 54a-56a. Nonethe-

less, disregarding the distinction between direct and consequential damages, the district court held that the government was entitled to prove all foreseeable damages proximately caused by the filing of the false claim, including "the replacement and repair value of the destroyed and damaged helicopters, as well as the related costs and expenses associated with it." *Id.* at 56a.

After these rulings, the parties entered into a settlement (1) resolving other claims unrelated to the loss of the Saudi helicopter, (2) preserving the right of Boeing to appeal the HVIC and FCA damages rulings as to the Saudi helicopter claim, and (3) providing for liquidated damages, contingent on the disposition of the issues appealed. App. 3a-4a. As part of the settlement, the parties stipulated, *inter alia*, that the HVIC exception for misconduct by "Contractor managerial personnel" was not at issue in this case, and that the loss of the helicopter was caused by the defective Speco gear. *Id.* at 9a. The district court certified an interlocutory appeal on both the HVIC and FCA issues, and the court of appeals accepted jurisdiction. *Id.* at 98a, 100a-101a.

3. A divided Sixth Circuit affirmed. On the HVIC issue, the majority acknowledged the "fairly broad terms" of the HVIC's limitation on liability, but refused to construe the clause to limit liability under the FCA. App. 8a. The majority ruled simply that "[b]ecause nothing in the HVIC suggests that its limitation of contractor liability covers statutory violations, we hold that the district court did not err in concluding that the HVIC does not provide a defense to damages sought under the FCA." *Id.* at 10a. The majority conceded that "[o]n one level, the dispute in this case is essentially the same as the one in" *United States* v. *United States Cartridge Co.*, 198 F.2d 456 (8th Cir. 1952), see App. 10a, in which the Eighth Circuit held that a broad limitation-of-liability clause that did not reference the FCA nonetheless precluded FCA liability. 198 F.2d at 465. Relying upon the allegedly different context of *United States Cartridge* (a

wartime contract with government supervision of production), however, the majority distinguished the present case based on its view that the helicopter remanufacturing contract was one performed "almost entirely during peacetime" and that "Boeing was not subject to government supervision or control." App. 12a.

On the issue of FCA damages, the majority purported to apply the "'diminished value'" test of *United States* v. *Bornstein*, 423 U.S. 303 (1976), under which the court will "subtract the market value of what the Government received from what it was promised." App. 16a. The majority then equated the market value of what "was promised" in the instant case with the market value of a fully-conforming remanufactured helicopter. *Id.* at 16a-17a. It then held that the market value of the helicopter "as received" was zero because the defective gear was flight-critical. *Id.* at 18a. The government was therefore entitled to recover treble "the value that Aircraft 89-0165 would have had if it had been of the specified quality." *Id.* at 19a.

Judge Boggs dissented on the grounds that the HVIC foreclosed recovery for the lost helicopter: "the Government [is] trying to do exactly what the plain and obvious wording of its contractual term says it will not do: recover from 'the Contractor' for the 'loss of or damage to property of the Government.'" App. 20a. Judge Boggs refuted the majority's claim that the HVIC could not be harmonized with the FCA:

> The HVIC does not overwrite or preempt the FCA by relieving contractors of liability for fraud. The FCA is still applicable to the contractors; the only difference made by the HVIC is that the Government has agreed that it will not hold the contractors liable under any theory for the value of the helicopter. Accordingly, the Government can sue the contractors under the FCA and seek a finding of liability for fraud; the Government merely can not seek damages for the value of the

> equipment. The other penalties under the FCA are still applicable, and if the Government feels that it has been defrauded, it may debar Boeing from Government contracts.

Id. at 21a-22a. Moreover, recounting the history of the HVIC outlined above, Judge Boggs declared that the majority's decision was contrary to the purpose of the HVIC, which was to reduce government procurement costs by eliminating the need for contractor insurance. *Id.* at 25a. Under the majority's decision, "contractors will have to insure against potential FCA liability for treble damages for the loss of high-value items resulting from actions that might be held to be fraudulent on the part of any personnel," and "[p]resumably, this cost will be passed on to the Government." *Id.*

REASONS FOR GRANTING THE PETITION

Review by this Court of both of the Sixth Circuit's separate holdings is necessary (i) to resolve conflicts between the Sixth and other Circuits with respect to each such holding, and (ii) to provide for the uniform resolution of critical and unsettled questions relating to the relationship between the United States and its suppliers of major military systems and other materiel.

The Sixth Circuit's holding that the limitation of liability plainly expressed in the High Value Items Clause ("HVIC") does not in any way limit a contractor's liability for damages in an FCA case is irreconcilable with Eighth Circuit precedent. Moreover, the construction of the HVIC espoused by the court below vitiates the settled contractual understanding between the government and its suppliers of major weapons systems and other equipment that the government generally bears the risk of loss of "high value" items (such as ships, missiles or, as in this case, aircraft) resulting from defects in their manufacture. Thus, the decision below, if not reviewed, will force the government's

most important suppliers to decide whether to obtain commercial insurance against the risk of loss of every airplane, ship or other multi-million dollar system they manufacture and to charge the very high cost of such insurance to the government, as the FAR permits;[4] to self-insure and risk insolvency; or to cease doing business with the government altogether.

The Sixth Circuit's second holding – that damages recoverable under the FCA, before trebling, are not limited in any way by the total amount paid by the government on the claim alleged to be false – conflicts squarely with the Fifth Circuit's holding that baseline damages under the FCA are limited to "the amount wrongfully paid to satisfy the false claim." *Aerodex*, 469 F.2d at 1011. Moreover, as shown in detail *infra* at 22-30, the Sixth Circuit has done in this case precisely what Congress declined to do in the 1986 Amendments to the FCA: namely, overrule *Aerodex* and permit consequential damages under the FCA.

Thus, the decision below deals a double blow to longstanding government procurement policies and those who do business with the government. First, by eviscerating the HVIC, it upsets decades-old reliance interests of government contractors and threatens to increase government procurement costs. Second, the Sixth Circuit's dramatic expansion of FCA damages leaves contractors faced with nearly unbounded exposure to three times potentially massive damages (such as an entire aircraft), no matter how small their claim. The Court should grant certiorari to foster and restore uniformity among the courts, and prevent undue disruption of the contractual relationships between the United States and its suppliers, large and small, of military and other equipment.

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[4] The costs of insurance for the risk of loss of or damage to government property may be passed through to the extent a contractor is liable for such loss or damage. 48 C.F.R. § 31.205-19(a)(2)(iv).

I. THIS COURT SHOULD RESOLVE THE CONFLICT OVER IMPLIED FCA EXEMPTIONS FROM GOVERNMENT CONTRACTS.

The decision of the divided court of appeals creates a substantial conflict among the circuits about whether the HVIC operates as limitation on damages under the FCA. In holding that it does not, the Sixth Circuit has read an exception into the Clause that is not encompassed in its plain language, thereby disrupting the settled expectations of defense contractors about the clear rules that have governed contractor liability for the past 50 years. Federal regulation requires the HVIC to be included in virtually every government contract for the purchase of high-end military systems such as planes, ships and missiles, as well as many civilian systems. 48 C.F.R. § 46.803(b). The Sixth Circuit's unprecedented decision negates the FAR's carefully crafted rules regarding assumption of risk for damages to these critical defense systems, and thus leaves military contracting in a state of great uncertainty at a particularly critical juncture in our Nation's diplomatic and military history.

1. The HVIC expressly states that a "Contractor *shall not be liable* for loss of or damage to property of the Government ... that (1) occurs after Government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies." *Id.* § 52.246-24 (emphasis added). As even the majority below conceded, this provision plainly "limits contractor liability for high-value items in fairly broad terms." App. 8a. Despite the plain language and history of the HVIC, see *supra* at 3-6, the majority held that the protections of the HVIC did not extend to damages arising under the False Claims Act, because "nothing in the HVIC suggests that its limitation of contractor liability covers statutory violations." App. 10a. Thus, as Judge Boggs emphasized in his dissenting opinion below:

> Put most simply, this case is about the Government trying to do exactly what the plain and obvious wording

> of its contractual term says it will not do: recover from "the Contractor" for the "loss of or damage to property of the Government."

Id. at 20a (Boggs, J., dissenting).

The decision below is in direct conflict with the United States Court of Appeals for the Eighth Circuit, which refused to exempt FCA claims from an express contractual provision limiting a defense contractor's liability to the government. *United States* v. *United States Cartridge Co.*, 198 F.2d 456 (8th Cir. 1952). *United States Cartridge* involved a contract for the mass production of ammunition that contained a clause strikingly similar to (although predating) the HVIC; it provided "'that the Contractor shall not be liable'" for any loss or damage to government property unless it resulted from the misconduct "'of the corporate officers of the Contractor or of other representatives of the Contractor having supervision and direction of the operation of the Plant as a whole.'" *Id.* at 461. The government brought an action against the contractor under the FCA, arguing that if the contract clause were "construed to exempt" the contractor from liability for fraud, it would be "void because in derogation of the False Claims Statute, [and] contrary to public policy." *Id.*

The Eighth Circuit rejected the government's argument and affirmed the dismissal of its FCA claims. The court stated that "[t]he Secretary of War ... unquestionably by the contract in suit undertook to allocate the risks and obligations which were to be assumed by the [contractor] and those which were to be borne by the Government." *Id.* at 465. The Secretary was empowered to decide that the national interest was best served by the government bearing the risk of fraud by non-managerial employees, and the government would be held to the terms of the bargain it struck. *Id.*

In direct conflict with this ruling, the Sixth Circuit has refused to allow a similar contractual allocation of risk, holding that "[t]he HVIC does not foreclose the FCA as a

means for the Government to recover damages." App. 14a; see also *id.* at 20a (objecting to the majority's holding "that the Government can seek under the FCA exactly what it has contracted through the HVIC not to" (Boggs, J., dissenting)). Indeed, the majority even acknowledges that "the dispute in this case is essentially the same as the one" in *United States Cartridge*. *Id.* at 10a.

The majority sought to distinguish *United States Cartridge* on the basis that the contract in question was a response to a wartime crisis and involved unusual government supervision, but its proposed distinction is unavailing.[5] First, because of its experience in World War II, the Department of Defense deemed it to be in the government's interest to formalize and extend its policy of self-insuring to virtually all contracts for the procurement of high-value defense systems. Hence, the HVIC has applied since its inception to all high-value weapons procurement (including any wartime procurements), regardless of the nature of the government's involvement in the execution of the contract. Second, Congress has drawn no distinction between the Secretary's statutory power to enter into procurement contracts during war and peacetime, and there is no substantive difference between the Secretary's statutory powers now and at the time of the *United States Cartridge* contract. Compare 10 U.S.C. §§ 2202, 2302-2331, with 198 F.2d at 463; see also 41 U.S.C. § 405(a). Third, these are high-value *military* systems, purchased by the government to assist in the nation's defense and, if necessary, to utilize in armed conflict. In fact, the helicopter in this case was lost in Saudi Arabia in the midst of Operation Desert

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[5] The Sixth Circuit also suggested that "Boeing was not subject to Government supervision or control" to the same extent as the U.S. Cartridge Company, and therefore that the two contracts could be distinguished on that basis. App. 12a. To the contrary, as is true with many high-value defense contracts in the modern era, government supervision of contract performance was extensive and included the placement of numerous government quality assurance representatives and inspectors at both Speco and Boeing. C.A. J.A. 334, 761.

Storm. The meaning of plain contract language cannot shift depending on the happenstance of whether the contract is signed – typically years before the damage – when the nation is at war or at peace.

Most fundamentally, the Eighth Circuit discussed the special circumstances of the *United States Cartridge* contract to explain why it was not against public policy for the Secretary "to limit the defendant's risks in that regard to whatever extent he deemed necessary in order to secure its managerial services to produce, under Government supervision, ammunition for the armed forces." 198 F.2d at 465. The risks facing that contractor may have been *different* from the contractor risks (catastrophic loss) that animate the HVIC, but that difference in no way affects the core holding of *United States Cartridge*: when the Department of Defense, pursuant to statutory authority, determines that it is in the national interest for the government to assume the risk of loss from nonmanagerial fraud through unqualified limitation-of-liability clauses, those clauses must be enforced by their plain terms even against claims for damages under the FCA. The government can and should be held to the terms of its bargain. The decision of the majority below, by refusing to enforce the plain language of the HVIC, directly conflicts with *United States Cartridge*. See also *United States* v. *Winstar Corp.*, 518 U.S. 839, 909 (1996) (plurality) (noting that an "allocation of risk" to the government "that was essential to the contract between the parties" must be enforced according to its terms).

The majority's decision also conflicts with the Fourth Circuit's recent decision in *United States* v. *Bankers Insurance Co.*, 245 F.3d 315 (4th Cir. 2001). In that case, the government argued that it should not be bound by a contractual provision mandating submission of a dispute to arbitration because it wished to pursue a separate statutory FCA claim. The government argued that the "FCA claim [was] premised on a unique statutory right," *id.* at 325, and

that enforcement of the arbitration provision would dilute "the statutory authority of the Attorney General as the exclusive enforcer of the FCA." *Id.* at 323-24.

In rejecting the government's arguments, the Fourth Circuit began with the "well settled" principle "that, when the United States is a party to a contract, ordinary principles governing contracts and their interpretation remain applicable." *Id.* at 321. The court then held that "[t]he Government should comply with its contract obligations, and it cannot avoid them merely by invoking a statutory civil claim, such as one contemplated under the FCA." *Id.* at 324. The majority below attempted to distinguish *Bankers Insurance* on the ground that the contract provision there only *delayed* the government's FCA claim, because the government retained the right to litigate after arbitration. App. 12a-13a. But, as Judge Boggs rightly observed, this is a false distinction, because "the reasoning of *Bankers Insurance* still applies to the case at hand" and commands a different result. *Id.* at 22a n.2. The Sixth Circuit in this case condoned the government's attempt to do what the Fourth Circuit ruled it cannot: evade enforcement of the plain language of a contractual provision because of the existence of an alleged FCA violation.

The Sixth Circuit's decision is not justified by the need to reconcile the HVIC with the FCA, as it suggests. App. 7a, 13a. As Judge Boggs pointed out, the HVIC does not prevent enforcement of the FCA, it merely prevents the government from recovering one element of loss for which the government by contract explicitly assumed the risk as a matter of sound and longstanding policy. *Id.* at 21a-22a. Such a result, Judge Boggs observed, does not override the FCA; it merely "uphold[s] the obvious coverage of a standard assumption of risk clause, under which the Government agreed not to exercise certain rights it would otherwise have in exchange for a benefit." *Id.* at 25a. The government, moreover, can still recover FCA damages other than for the

loss of the helicopter; collect civil penalties; proceed criminally; and debar the violator from government contracting. *Id.* at 21a-22a, 25a.

2. The conflicts of authority identified above alone justify certiorari, but the overriding importance of this issue makes this Court's immediate review imperative. Assumption of risk clauses "ensure[] ... the government is able to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting." *Winstar*, 518 U.S. at 913 (Breyer, J., concurring). Yet, under the Sixth Circuit's ruling, not just the HVIC but numerous assumption-of-risk clauses incorporated in government contracts pursuant to the FAR, *supra* at n. 2, are ineffective against FCA damages claims.

The exemption of FCA damages claims from the HVIC creates broad exposure for contractors. Contractor liability under the FCA is not limited to common law fraud, but now includes "deliberate ignorance" and "reckless disregard of the truth or falsity of the information," 31 U.S.C. § 3729(b), which the government in this and other cases has asserted amounts to gross negligence. In the aftermath of an accident, even good-faith actions on mission-critical parts (which are ubiquitous in complex weapons systems) can be recast as "reckless" conduct in breach of contract. The act of a single low-level employee, among perhaps thousands who may work on a major weapon system, can thus create substantial liability for contractors under the treble damages provision of the FCA.

The reliance interests undercut by the decision below are staggering. Given the clear Department of Defense policy of self-insurance that has been in effect since World War II, and the amendment of the HVIC in 1974 to eliminate an exception for fraud by all personnel save the most senior managers, contractors have forgone the purchase of insurance that would protect against risk of damage or loss of high-

value government items. Now, as a result of the Sixth Circuit's unprecedented and unexpected decision, contractors face potentially massive retroactive liability against which they could have, and surely would have, insured. See, *e.g.*, *North Bank* v. *Cincinnati Ins. Cos.*, 125 F.3d 983, 988 (6th Cir. 1997) (intentional misconduct insurable); *Andover Newton Theological Sch., Inc.* v. *Continental Cas. Co.*, 930 F.2d 89, 91 (1st Cir. 1991) (same). This exposure encompasses almost every major space and military contract of recent vintage: contracts that may have been executed many years (even decades) ago but because of their complexity are still being performed, as well as the fully performed contracts that are still subject to the lengthy FCA limitations period (which extends up to 10 years from the date of violation, 31 U.S.C. § 3731(b)).

The financial risks to contractors and subcontractors who supply, retrofit or repair aerospace and defense systems dwarf even the substantial liability the government sought to impose here. A B-2 Bomber or a Virginia Attack Submarine has a unit cost of over $2 billion; a LPD-17 Landing Ship or a DDG-51 Destroyer nearly $1 billion; a J-STARS Reconnaisance Aircraft $560 million; a Trident missile $61 million. Center for Def. Info., *Military Almanac 2001-2002*, at 36 (2002). Spacecraft and satellite risks are of similar or greater magnitude. Risk is not limited to total loss of the craft; damage to even a single subsystem may run well into the millions of dollars. All these potentially ruinous losses are subject to trebling under the FCA if, the government maintains, as little as gross negligence by any employee is found in relation to a defective part.

The decision below immediately shifts billions of dollars of risk from the government to private industry. Given the plain meaning and history of the HVIC, it would be manifestly unfair to allow the government to reap such a windfall at contractors' expense. Over the last half century, the government has avoided significantly higher procurement

costs by inducing contractors and subcontractors to forgo the purchase of insurance through a promise of self-insurance. Now in the face of a significant loss, the government has disclaimed its previous bargain and sought to impose an unbargained-for liability on its contractors. At a minimum, the legality of such massive risk-shifting is an issue that should be decided by this Court, and not left in the hands of a badly divided Sixth Circuit.

The prospective effects of the decision below are equally intolerable because of the pervasive uncertainty in government contracting that will persist until this Court settles the scope of the HVIC and other FAR limitation-of-liability clauses. No contractor can accurately price bids for weapons or other major systems without knowing its liability risks. Furthermore, so long as it is uncertain whether the HVIC operates to limit damages under the FCA, no prudent contractor will leave potentially ruinous risks uninsured where insurance can be purchased. Indeed, not only prime contractors, but also subcontractors will now have to insure, because each subcontractor will face potential liability to prime contractors that no longer would be protected by the HVIC. The resulting pyramid of insurance "premiums for product liability insurance protection throughout the complete subcontracting chain" for risks of great magnitude would add vast sums to government procurement costs, *Commission Report* at 97, C.A. J.A. 407, which defeats the very purpose of the HVIC program. Where commercial insurance is unavailable, companies that cannot afford the risk of self-insurance (particularly suppliers of low-value but mission-critical parts) may abandon government contracting; those that can self-insure must raise contract prices to cover the risks.

Judge Boggs recognized the disastrous implications of the majority's holding in his dissent:

> [U]nder [the court's decision today], contractors will have to insure against potential FCA liability for treble

> damages for the loss of high-value items resulting from actions that might be held to be fraudulent on the part of any personnel. Presumably, this cost will be passed on to the Government.

App. 25a (Boggs, J., dissenting). This Court should review the decision below, which manifestly undermines the HVIC regulation that has been a cornerstone of government procurement policy, as well as decades of reasonable reliance by contractors upon that regulation.

II. THIS COURT SHOULD RESOLVE WHETHER FCA DAMAGES, BEFORE TREBLING, CAN EXCEED THE TOTAL AMOUNT PAID OUT BY REASON OF THE CLAIM ALLEGED TO BE FALSE.

The Sixth Circuit's holding on damages recoverable under the FCA deepens the divisions among the Circuits and adds substantially to the uncertainty and lack of uniformity in the courts concerning the measure of damages under the FCA. In particular, the Sixth Circuit's decision is out of step with *United States* v. *Bornstein*, 423 U.S. 303 (1976) and *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), and conflicts squarely with the Fifth Circuit's holding in *Aerodex* that "a proper application of the [FCA] damage provision limits the government's claim to the amount that was paid out by reason of the false claim." 469 F.2d at 1011.[6] *Aerodex* teaches that damages that exceed the amount the government paid for a defective product, such as the cost of repairing the defect or replacing the product, may be recoverable by the government under breach of warranty, common law fraud or other theories, but they are not the measure of baseline damages to be multiplied under the FCA. Moreover, by

[6] At the time of the *Aerodex* decision, the FCA referred to damages sustained "by reason of" the defendant's act. This phrase was changed to the current language, "because of," 31 U.S.C. § 3729(a), as part of a recodification in 1982, but the change was not intended to make any "substantive changes in the law." *See* H.R. Rep. No. 97-651, at 2 (1982).

allowing damages, before trebling, that are a multiple of the amount of the allegedly false claim, the Sixth Circuit works a change in the FCA that Congress expressly rejected in connection with the comprehensive 1986 Amendments to the FCA, when it specifically refused to overrule *Aerodex*, and rejected consequential damages under the Act.

No court has ever before ruled that, under the damages formulation endorsed by this Court in *Bornstein*, see *infra* at n. 11, a supplier of remanufacturing services and upgraded components could be liable under the FCA for three times the value of an entire aircraft if a single upgraded part is defective. In that sense, the Sixth Circuit's ruling is at odds with every court that has addressed these issues. By dramatically expanding a contractor's liability under the *Bornstein* rule, the Sixth Circuit's opinion threatens disastrous consequences for government contractors and underscores the need for this Court to speak authoritatively on this issue.

1. This Court long has recognized that "the chief purpose of the [FCA] was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum [as a penalty for each false claim] was chosen to make sure that the government would be made completely whole." *Hess*, 317 U.S. at 551-52.[7] Thus, the "device" in the FCA for ensuring complete recovery by the government is to provide for multiplication of the damages caused by the act of fraudulently inducing the government to pay out money, *not* to provide for recovery of all "reasonably foreseeable" damages that are the consequence of the facts that render the claim false, then trebling *those* damages. In the current Term, sixty years after *Hess* and in light of the 1986 Amendments to the FCA, the Court has again recognized this principle: "The treble damage provision [of the FCA] was, in a way, adopted by

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[7] As noted *supra* at 7-8, the 1986 FCA Amendments changed the statute to provide for treble, rather than double, damages. 31 U.S.C. § 3729(a).

Congress as a substitute for consequential damages." *Cook County*, 2003 WL 890268, at *7 n.9.

The Fifth Circuit's decision in *Aerodex* comports completely with this analysis, while the Sixth Circuit's decision in the instant case directly conflicts with it. In *Aerodex* the defendant had sold aircraft engine bearings to the Navy that were mislabeled so as to appear to meet a contract specification that they did not, in fact, meet. The Navy paid a total of $27,000 for the bearings themselves, but after the discrepancy was discovered, the Navy incurred an additional cost of nearly $161,000 in removing and replacing bearings that had been installed. 469 F.2d at 1010. The district court had computed the government's damages by first adding these two amounts together, before doubling (as the FCA then provided) the resultant sum. The Fifth Circuit reversed:

> Upon careful analysis, we hold that the language of the False Claims Act does not include consequential damages resulting from delivery of defective goods. The statute assesses double damages attributable to the "act," which in this case is the submission of the false vouchers. The submission of these vouchers was not the cause of the government's consequential damages. The delivery and installation of the bearings in the airplanes, not the filing of the false claim, caused the consequential damages.

Id. at 1011. Accordingly, the Fifth Circuit ruled that "a proper application of the [FCA] damage provision limits the government's claim to the amount that was paid out by reason of the false claim." *Id.*

The decision of the Sixth Circuit in the instant case is in irreconcilable conflict with *Aerodex*.[8] First and most obviously, the Sixth Circuit here has held that the FCA permits recovery of damages before trebling for the value of

[8] Although all parties in the court below briefed the *Aerodex* issues extensively, the Sixth Circuit does not even refer to the case in its opinion.

an entire remanufactured aircraft "if it had been of the specified quality" (possibly as much as $13 million), App. 19a & n.9, which is far in excess of the *Aerodex* limit of the amount paid out by reason of the claim alleged to be false (here, $4.1 million). Second, the Sixth Circuit has staked out a construction of the FCA that cannot be squared either with *Aerodex*, with the plain language of the statute, or with legislative intent. As the *Aerodex* court reasons, the plain language of the FCA provides for recovery of the damages that the government "sustains because of the act" of the defendant – that is, the submission of a false claim for payment. 31 U.S.C. § 3729(a). The damage sustained by the government because of the submission of a false claim is the payment of money that the government should not have had to pay. 469 F.2d at 1011. The consequences of the facts that make the claim false (in *Aerodex*, the fact that the bearings were defective) may cause other damages to the government, even the loss of an aircraft. Those damages, even if recoverable under a number of other theories, are not recoverable under the FCA.[9] *Id.* The FCA is about recovering money the government was fraudulently induced to pay, not about fashioning remedies for the consequences of allegedly substandard parts. See *Hess*, 317 U.S. at 551-52.

The Sixth Circuit's decision sidesteps the causation language of the FCA's damages provision and jumps straight to the conclusion that the submission of a false claim

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[9] In fact, the *Aerodex* court permitted the government in that case to recover, on a breach of warranty theory, precisely the same consequential damages it disallowed under the FCA. 469 F.2d at 1011-12. The government's amended complaint in the instant case (as is typical in cases of this nature) also contains a common law fraud count, *see* C.A. J.A. 118, and consequential damages typically are recoverable in common law fraud cases. *See Restatement (Second) of Torts* § 549(1)(b) & cmt. d (1976). Thus, if the HVIC were not a bar, the government would have other avenues for fully recovering its consequential damages, but should not be permitted first to add consequential damages to the contract price, then recover three times that combined amount under the FCA.

"caused" the helicopter in question to crash: "Although the loss of [the helicopter] occurred after Government acceptance and resulted from the defective Speco gear, it was actually caused by Boeing's initial misrepresentation that the helicopter conformed to contract requirements." App. 9a-10a. This analysis confuses and conflates the damage caused by submission of the false claim, *i.e.*, the unjustified payment of money, and the accident caused by the underlying product defect, independent of any certification of quality or product conformance.

As the analysis of the FCA's language in *Aerodex* makes clear, the conduct at which the False Claims Act is directed is inducement of payment under false pretenses, not negligence in manufacture or design, and the injury sought to be remedied is the direct financial harm represented by that payment, not consequential damages from product defects. Even if it could be said that the mishap here may not have occurred "but for" a multitude of events culminating in the operation of the helicopter with a defective part, the Sixth Circuit's holding that damage to property is compensable *under the FCA* if it would not have occurred "but for" the alleged false claim expands the statutory remedy far beyond its plain language and Congress's underlying intent. This expansive reading also has been consistently rejected by other circuits. See, *e.g.*, *United States* v. *Hibbs*, 568 F.2d 347, 351-52 (3d Cir. 1977) (discussing cases).

2. Congress's actions in passing the 1986 Amendments to the FCA confirm that the plain language of the FCA regarding damages means what *Aerodex* says it means and that the Sixth Circuit, by construing the statute in a way that conflicts with *Aerodex*, has done precisely what Congress refused to do in 1986. Amendments proposed in both the Senate and the House would have modified the FCA to allow for recovery of "consequential" damages. The precise purpose of these amendments, as made clear in the Senate

Report describing its proposed amendment, was to overrule *Aerodex*:

> [The proposal] also amends [the FCA] to permit the Government to recover any consequential damages it suffers from the submission of a false claim. For instance, where a contractor has sold the Government defective bearings for use in military aircraft, the Government could recover not only the cost of the new ball bearings, but the much greater cost of replacing the defective ball bearings. *See United States v. Aerodex Inc.*, 469 F.2d 1003 (5th Cir. 1972).

S. Rep. No. 99-345, at 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284. Advocates of the House version of the amendments also understood that by making "consequential" damages available the government would be able, if the FCA were amended as proposed, to recover replacement costs. See, *e.g.*, 132 Cong. Rec. H6480 (daily ed. Sept. 9, 1986) (remarks of Rep. Brown) (the proposed bill includes "consequential damages" to ensure that "recovery will reflect actual replacement cost in every instance").

In the end, however, these proposed amendments to the FCA were rejected by Congress in the bill as passed. 132 Cong. Rec. H9388 (daily ed. Oct. 7, 1986). The bill's leading proponent in the House, Representative Glickman, explained why: While the previous version of the bill passed by the House had included "double damages, consequential damages and costs," the version that ultimately was enacted into law "provides for treble damages and deletes consequential damages." *Id.* Representative Glickman identified this change as one of two "major differences" between the original House bill and the bill as compromised with the Senate, and noted that these compromises were "necessary in order for this legislation to become law." *Id.* It is clear from this history that, as this Court recently noted in *Cook County*, treble damages were adopted in 1986 as a "substitute" for "consequential" damages. 2003 WL 890268, at *7 n.9.

Moreover, under both the House and the Senate proposals, "consequential" damages were added on only after actual damages had been doubled or trebled, as the case may be.[10] Thus, none of the 1986 proposals before Congress went nearly so far as the government asks the courts to do in this case: *i.e.*, to include "consequential" damages in the baseline damages to be trebled.

3. The Sixth Circuit's decision in this case also deepens existing divisions among the courts as to the proper measure of damages in an FCA case involving substandard products. The court below pays lip service to the FCA measure of damages endorsed by this Court in *Bornstein*,[11] but no other court has extended the *Bornstein* rule as far as the Sixth Circuit in the instant case, which treated the value of the entire remanufactured aircraft as the benefit of a bargain to upgrade specified components of helicopters already owned by the government. The cases do reflect, however, division and uncertainty as to the meaning of the *Bornstein* rule.[12]

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[10] *See* S. 1562, 99th Cong (2d Sess. 1986), as passed by the Senate (providing for "3 times the amount of damages" unless the court finds certain conditions indicating the defendant's cooperation with federal officials, "in which case the court may assess not less than 2 times the amount of damages, in addition to the amount of consequential damages"); H.R. 4827, 99th Cong. (2d Sess. 1986), as reported from the House Comm. on the Judiciary, June 26, 1986 (providing for "an amount equal to consequential damages ... plus 2 times the amount of damages (other than such consequential damages)").

[11] Under *Bornstein*, "[t]he Government's actual damages are equal to the difference between the market value of the [goods] it received and retained and the market value that the [goods] would have had if they had been of the specified quality." 423 U.S. at 316 n.13.

[12] For example, the Federal Circuit in *Daff* v. *United States*, 78 F.3d 1566 (Fed. Cir. 1996), allowed damages under the FCA, without analysis of the *Aerodex* or *Bornstein* issues, for the Government's costs of testing and repair of defective components. In contrast, the Second Circuit, in *United States* v. *General Dynamics Corp.*, 19 F.3d 770, 777 (2d Cir. 1994), stated that "consequential damages" are recoverable "under the FCA and federal common law," but the only damages at issue in that case

While the damages permitted by the Sixth Circuit would typically be considered "consequential" under the Uniform Commercial Code or the common law,[13] the taxonomy of "direct" versus "consequential" damages has engendered considerable confusion. Indeed, as if to capitalize on the confusion, the Department of Justice ("DOJ") has instructed its attorneys that, "in attempting to recover damages which flow from the false claim, they should *not* be labeled 'consequential damages[,]' .... [but] should be shown to be the 'natural and proximate' result of the defendant's misrepresentations." DOJ, *Civil Division Fraud Monograph* 161 (Nov. 1988). Indeed, this "labeling" tactic worked for the government below; the district court held that "consequential" damages are not recoverable under the FCA, but that the government could nonetheless potentially recover damages, before trebling, up to and including the aircraft's replacement cost. App. 54a, 56a, 63a.

A consistent application of the *Bornstein* measure of FCA damages and the *Aerodex* rule limiting recovery to the amount improperly paid out by the government would contribute considerable certainty in this area. This solution would entail reaffirmation of the measure of damages first articulated by the Ninth Circuit many years ago in a case cited with approval by this Court in *Bornstein*, 423 U.S. at 317 n.13. In *United States* v. *Woodbury*, 359 F.2d 370, 379 (9th Cir. 1966), the court stated: "Ordinarily the measure of the

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were actual overcharges to the government resulting from a kickback. The recovery of an actual overcharge in an FCA case cannot in any sense be considered "consequential" damages.

[13] *See, e.g.*, 1 J. White & R. Summers, *Uniform Commercial Code* § 10-4, at 567 n.10 (4th ed. 1995) ("Whenever a defective component part causes an accident that damages the entire product, a large part of the total damage may be consequential."); U.C.C. § 2-715(2)(b) ("Consequential damages resulting from the seller's breach include ... injury to person or property proximately resulting from any breach of warranty."); *id.* cmt. 5 (consequential damages include those flowing from "the use of goods without discovery of the defect causing the damage").

government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful." This measure of damages is consistent with *Bornstein*, consistent with *Aerodex* and the Congress's refusal to overrule it, and consistent with the plain language of the FCA.[14]

4. The consequences of the Sixth Circuit's decision, if unreviewed, on the government contracting community would be breathtaking. In this case, a supplier that submitted a claim for $4 million to the government for retrofitting an existing aircraft could be found liable for nearly $40 million in damages, depending on the valuation of the aircraft it had upgraded. Indeed, under the Sixth Circuit's analysis, it would make no difference if the "remanufacturing" contract had been for only $1 million per aircraft or less and the value of the upgraded aircraft (like a B-2 bomber) stretched to more than a billion dollars; the contractor would still be liable for "the value that [the aircraft] would have had if it had been of the specified quality," App. 19a, times three. Nothing in the FCA justifies such a perverse rule, and it is unclear how many companies would continue to be willing to contract, or at what prices, with the government in such circumstances. Review by this Court is therefore essential.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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[14] Not only did the Sixth Circuit state the wrong standard for FCA damages, but its analysis is absurd on its own terms. The market value "as received" of a remanufactured helicopter with a defective gear is not zero, *see* App. 18a, any more than a 2003 Mercedes Benz with a defective transmission part has a market value of zero. Moreover, the market value of what Boeing "promised" was not the market value of the entire aircraft, *id.* at 18a-19a. Boeing contracted to upgrade an existing CH-47 helicopter owned by the government; the independent, pre-existing value of the government's helicopter was no part of what Boeing bargained to provide.

Respectfully submitted,

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March 21, 2003

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 00-4157

UNITED STATES OF AMERICA ex rel. BRETT ROBY,
Plaintiff-Appellee,

v.

BOEING CO.,
Defendant-Appellant.

Argued: Jan. 25, 2002
Decided and Filed: Sept. 12, 2002

Before MERRITT, BOGGS, and MOORE, Circuit Judges.

MOORE, J., delivered the opinion of the court, in which MERRITT, J., joined. BOGGS, J. (pp. 649-52), delivered a separate dissenting opinion.

OPINION

MOORE, Circuit Judge.

This action was brought under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, to recover damages for the loss of a helicopter that Defendant-Appellant Boeing Co. ("Boeing") had remanufactured or overhauled for military use. Boeing now raises the questions of law certified for interlocutory appeal by the district court, arguing that the district court erred in holding (1) that the High-Value Items Clause ("HVIC"), set forth in 48 C.F.R. ("FAR") § 52.246-24, and incorporated into the helicopter contract between the United States ("Government") and Boeing, does not operate

as a defense to damages sought under the FCA and (2) that the Government may recover damages for the loss of the helicopter. We AFFIRM the judgment of the district court.

I. BACKGROUND

In 1985 and 1989, the United States Army ("Army") awarded multiyear procurement contracts totaling approximately $2 billion to Boeing for the remanufacture of almost four hundred Boeing-manufactured CH-47A/B/C Chinook helicopters to the CH-47D configuration. As part of these contracts, Boeing was required to inspect and to ensure the quality of all of the parts used for the remanufacture, including those items purchased from its chosen subcontractors. The contracts provided warranty coverage for the helicopters from all defects in material and workmanship for the lesser of two-hundred flight hours or twenty-four months after acceptance.

On August 28, 1990, the Army accepted delivery of a remanufactured CH-47D helicopter ("Aircraft 89-0165"). The next day, Boeing submitted a claim for payment to the Government, in the form of a $4.1 million invoice for Aircraft 89-0165. On January 11, 1991, after fifty-six flight hours, Aircraft 89-0165 suffered the failure of a defective flight-critical transmission gear [1] and crashed during a low-level contour flight over the Saudi Arabian desert as part of Operation Desert Shield. Aircraft 89-0165 and its contents were totally destroyed at a loss of at least $10 million. The Army replaced Aircraft 89-0165 with a new CH-47D helicopter that cost almost $13 million.

On May 22, 1995, Relator Brett Roby ("Roby") filed a *qui tam* action under seal pursuant to 31 U.S.C. § 3730(b) on behalf of himself and the Government, alleging that Boeing

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[1] A "flight critical part" is necessary for flight; its failure could cause the loss of the aircraft. J.A. at 1451 (Gray Dep.).

and its supplier, Speco Corp. ("Speco"), had violated the FCA by making false statements about the manufacture and sale of defective transmission gears to the Army via Boeing's remanufactured CH-47D helicopters. Speco manufactured the gears that Boeing installed into the CH-47D helicopters before their delivery to the Army. On April 30, 1997, the Government intervened and filed an Amended Complaint against Boeing, which was unsealed on May 1, 1997.

In its Answer, Boeing denied the allegations of FCA violations and raised a total of twelve affirmative defenses. Specifically, Boeing claimed: (1) that the HVIC, included by regulation in the helicopter contract, barred the damages sought under the FCA and (2) that consequential damages were not available under the FCA.

On December 21, 1998, the Government filed a motion for partial summary judgment, challenging Boeing's assertion of the HVIC as an affirmative defense. After hearing oral argument, the district court granted the motion. *United States ex rel. Roby v. Boeing Co.*, 73 F.Supp.2d 897, 912 (S.D.Ohio 1999) ("*Roby I*"). On February 5, 1999, Boeing filed a cross-motion for partial summary judgment as to the measure of damages. After hearing oral argument, the district court granted Boeing's motion in part, with respect to the general issue of consequential damages, but denied the motion as it related to the Government's damages in this case. *United States ex rel. Roby v. Boeing Co.*, 79 F.Supp.2d 877, 895-96 (S.D.Ohio 1999) ("*Roby II*").

On August 3, 2000, before trial, the parties reached a settlement under which Boeing made an immediate payment of $25 million. The settlement did not include the FCA claim arising from the Saudi crash; an additional payment of $15 million is contingent upon the outcome of this appeal. The

district court accepted the settlement and certified for interlocutory appeal the following questions of law:

1. Whether the [Government] can recover damages under the [FCA] for loss of a helicopter resulting from the failure of a defective flight-critical component part; and

2. Whether the [HVIC] contained in [FAR] § 52.246-24 and incorporated in the Boeing CH-47D helicopter contract operates as a defense to damages sought under the [FCA] for the loss of or damage to a helicopter resulting from the failure of a defective component part.

J.A. at 214 (Order to Amend and Certify). On September 18, 2000, we granted Boeing's petition for permission to appeal. We have no question before us concerning whether and to what extent Boeing's conduct was fraudulent. Rather, the question is whether the HVIC precludes liability under the FCA, assuming that liability would otherwise exist.

II. ANALYSIS

In an interlocutory appeal, we review a district court's legal conclusions de novo. *Northwestern Ohio Adm'rs, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018, 1023 (6th Cir.2001).

A. Mootness

We first consider sua sponte the jurisdictional question whether the parties' settlement of August 3, 2000, renders this case moot. Under Article III of the Constitution, our exercise of judicial power is limited to "actual cases or controversies." *Affholder, Inc. v. Preston Carroll Co.*, 866 F.2d 881, 885 (6th Cir.1989) (quoting *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)) (internal quotation marks omitted). "Settlement of a claim before a final adjudication moots the claim and deprives the federal judiciary of jurisdiction over the claim." *Id.* Agreements to limit recoverable damages, however, do not moot cases and therefore do not affect our jurisdiction. *Id.*

The parties' settlement in this case is essentially the same as the agreement to liquidate damages that was reached in *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), where a discharged air force employee sought civil damages from the former president. *Id.* at 733, 102 S.Ct. 2690. Under the terms of the agreement, the employee accepted $142,000, with an additional amount of $28,000 contingent upon the Supreme Court's ruling that the former president was not entitled to absolute immunity. *Id.* at 744, 102 S.Ct. 2690. Observing that "[t]he limited agreement between the parties left both petitioner and respondent with a considerable financial stake in the resolution of the question presented in this Court," the Court concluded, "Given respondents' continued active pursuit of monetary relief, this case remains definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* (quotation omitted).

In this case, Boeing has already paid the Government $25 million; it has agreed to pay an additional amount of $15 million contingent upon our rulings with respect to the scope of the FCA and the HVIC. Therefore, because the parties have "a considerable financial stake," the case is not moot, and we will proceed to the merits of this appeal.

B. The FCA and the HVIC

The history of the FCA dates back to 1863, when it was enacted "with the principal goal of stopping the massive frauds perpetrated by large [private] contractors during the Civil War." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (quotation omitted). The FCA has since become the primary means by which the Government combats and deters fraud. H.R.Rep. No. 99-660, at 18 (1986). As amended in 1986, the FCA provides for a civil penalty from $5,000 to $10,000 and treble damages when an individual knowingly acts to defraud the Government and does not "fully

cooperate[ ] with any Government investigation of such violation." 31 U.S.C. § 3729(a). The Supreme Court understands the current version of FCA damages to be "essentially punitive in nature." *Vt. Agency*, 529 U.S. at 784, 120 S.Ct. 1858 (explaining that the Court had "suggested that damages under an earlier version of the FCA were remedial rather than punitive [because] that version of the statute imposed only double damages and a civil penalty of $2,000 per claim" (citations omitted)).

Whereas the FCA allows the Government to recoup losses from fraud, the HVIC helps to manage the costs of liability insurance. Since 1984, the Federal Acquisition Regulations ("FAR") have prescribed the insertion of the HVIC in certain government contracts to limit the liability of contractors "for loss of or damage to property of the Government (including the supplies delivered under th[e] contract) that (1) occurs after Government acceptance of the supplies delivered under th[e] contract and (2) results from any defects or deficiencies in the supplies." FAR § 52.246-24(a).[2] The HVIC covers the loss of or damage to a high-value item, defined as "a contract end item that (a) has a high unit cost (normally exceeding $100,000 per unit) . . . and (b) is designated by the contracting officer as a high-value item." *Id.* § 46.802. Regarding such high-value items, the Government's stated policy is to "act as a self-insurer" and to "relieve contractors of contractual liability for loss of or damage to those items." *Id.* § 46.803. In short, the HVIC represents the Government's assumption of the risk that a high-value item such as Aircraft 89-0165 may be lost or damaged after acceptance as a result

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[2] From 1971 to 1984, when the FAR became effective, Armed Services Procurement Regulation ("ASPR") 7-104.45 relieved contractors of such liability. *See* J.A. at 437 (Defense Procurement Circular 86 ("DPC 86") at 4), 485-86.

of a defect or deficiency in the item. It does not necessarily imply that the Government has self-insured for the damages that result from violations of federal law.

Boeing itself accepts the fact that, "[a]ssuming the government could prove a false claim, a contractor would remain liable for penalties and, if there be any, other appropriate FCA damages, notwithstanding the HVIC." Appellant's Br. at 31. However, relying on the text and history of the HVIC, Boeing argues that the HVIC prohibits the recovery of damages under any and all causes of action, when those damages result from the fraud of non-managerial personnel, meaning that there would be no appropriate FCA damages in this case. The issue before us is whether the HVIC's limitation of contractor liability extends to cases brought under the FCA. Specifically, we must decide whether the Government has agreed to limit damages that would otherwise be recoverable under the FCA.

In holding that the HVIC provides no defense to claims of FCA violations, the district court first noted that the FAR limit the application of the HVIC "to contractual remedies and not to claims premised under the [FCA]"; indeed, the HVIC and the FCA are silent with respect to each other. *Roby I*, 73 F.Supp.2d at 910. Therefore, the district court declined to find them inconsistent. *Id.* Because FCA claims arise from the submission of a false or fraudulent claim, the district court concluded that the HVIC's limitation on contractual liability did not limit a contractor's liability under the FCA, finding no evidence in the record of any such intent on the Government's part. *Id.* at 910-11. Finally, the district court distinguished *United States v. United States Cartridge Co.*, 198 F.2d 456 (8th Cir.1952), *cert. denied*, 345 U.S. 910, 73 S.Ct. 645, 97 L.Ed. 1345 (1953), which held that a liability-limiting contract provision did limit the Government's

FCA claims, *id.* at 465, on the ground that the contract was made in the emergency situation preceding World War II, making the case unique. *Roby I*, 73 F.Supp.2d at 911-12.

We agree with the district court that the HVIC does not bar the Government from suing Boeing under the FCA to recover damages for Aircraft 89-0165. We look first to the language of the FCA, which holds a defendant liable for a civil penalty "plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a). The allegedly fraudulent act in this case is Boeing's "false[ ] represent[ation] that the helicopters conformed to contract requirements and fail[ure] to disclose their faulty manufacture to the United States Government." J.A. at 87 (Am. Compl. at ¶ 3).[3] Because of this false claim, the Government sustained the loss of Aircraft 89-0165. Therefore, the Government argues that Boeing is liable under the FCA for treble damages as well as a civil penalty.

At this point, Boeing would direct us to the HVIC, which limits contractor liability for high-value items in fairly broad terms:

> Except as provided in paragraphs (b) through (e) below, and notwithstanding any other provision of this contract, the Contractor shall not be liable for loss of or damage to property of the Government (including the supplies delivered under this contract) that (1) occurs after Government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies.

FAR § 52.246-24(a). The HVIC does not reference the FCA, but it does expressly refuse to limit a contractor's liability

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[3] We note that Boeing "vigorously denies" any knowing submission of a false claim in this case. Reply Br. at 4. However, we must assume such a submission to address whether the HVIC precludes FCA damages when incorporated as a contract provision.

when "the Government's acceptance of [a high-value item] results from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel." FAR § 52.246-24(b).[4] The parties have stipulated that this exception is not at issue in this case. Therefore, according to Boeing, the HVIC's limitation of liability for loss or damage is absolute, precluding the Government from recovering any damages (as opposed to a civil penalty) under the FCA.

We cannot dispose of the FCA claim so easily. Although the loss of Aircraft 89-0165 occurred after Government acceptance and resulted from the defective Speco gear, it was actually caused by Boeing's initial misrepresentation that the

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[4] This exception originally included "fraud or gross negligence as amounts to fraud[ ] on the part of any personnel of the Contractor." J.A. at 437 (ASPR 7-104.45(b)(ii) (1971)). The defense industry objected to this provision on the following grounds:

> Today's exposure to possible infiltration by any number of dissident factions in our society serves to highlight the impossibility of any management to reasonably accept as an uninsured risk the results of any individual's actions regardless of the extreme nature of such acts.
>
> Therefore, the introduction of this exception goes a long way toward negating the main purpose of DPC 86; that is, to remove from the Contractor the risk of potential liability for damage to Government property and eliminate from Government procurement the cost of Contractors' liability insurance against such liability for damage to Government property.
>
> Unless the insurance exception is substantially modified and the exception regarding fraud of any personnel is removed, there is serious question whether DPC 86 implementation will have any real effect upon the cost of Contractor insurance included in the overall cost of the Government procurement program.

J.A. at 464-65 (Letter from Council of Defense and Space Industry Associations, to Captain E.C. Chapman, Chairman, ASPR Committee 4-5 (Aug. 12, 1971)). The Department of Defense eventually accepted the recommendation to delete the provision.

helicopter conformed to contract requirements.[5] *This misrepresentation*, which triggered FCA liability, is the key to this case. Boeing argues from the "willful misconduct or lack of good faith" language in the managerial personnel provision, FAR § 52.246-24(b), that damages for FCA violations must be covered by the general limitation of liability. We do not agree. Were the HVIC a typical insurance policy, we would consider resolving the ambiguity in Boeing's favor. *Cf. North Bank v. Cincinnati Ins. Cos.*, 125 F.3d 983, 986-87 (6th Cir.1997) (stating that Michigan law requires courts to construe ambiguous provisions and exclusionary clauses in insurance policies against the insurer). The aim of the HVIC, however, is to "reduc[e] Government procurement costs by limiting the contractor's risk." J.A. at 434 (DPC 86 at 1). The HVIC insures contractors only indirectly; it is, by its own terms, a self-insurance policy, which means that the Government is both insurer and insured. Because nothing in the HVIC suggests that its limitation of contractor liability covers statutory violations, we hold that the district court did not err in concluding that the HVIC does not provide a defense to damages sought under the FCA.

On one level, the dispute in this case is essentially the same as the one in *United States Cartridge Co.*, where the defendant operated a Government-owned ammunition plant during World War II. *United States Cartridge Co.*, 198 F.2d at 458. The Government alleged that the defendant had presented claims for payment that were false because it "fail[ed] to maintain a proper system of inspection and to produce the quality of ammunition called for by the contract." *Id.* In its answer, the defendant denied any wrongdoing and

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[5] In other words, the loss would not have occurred as it did if Boeing had not warranted conformance, because the Government would have required the correction, repair, or replacement of the gear, which was under warranty. The HVIC itself emphasizes this obligation. FAR § 52.246-24(d)(1).

argued that its liability was limited by contractual terms similar to the HVIC. *Id.* at 459-60. After a bench trial, the district court dismissed the case, noting that the limitation of liability was stated in "broad terms" and did not violate public policy. *Id.* at 460-63. The Eighth Circuit affirmed the dismissal. *Id.* at 465.

Not surprisingly, the parties disagree as to whether and how the *United States Cartridge Co.* decision should affect our disposition of this case. We think that the district court correctly distinguished the two cases. *See Roby I*, 73 F.Supp.2d at 911-12 (emphasizing "the emergency situation" of war in *United States Cartridge Co.* and contrasting the "extensive governmental control of a prime contractor" in that case with the "limited governmental monitoring" in the case at bar). Moreover, we believe that the Government's public policy argument in this case is stronger than it was in *United States Cartridge Co.*, where the Eighth Circuit concluded:

> If this contract were to be regarded as one creating the conventional relationship between the Government and a commercial corporate contractor not subject to Government supervision and control, for the supplying of goods or services, and if the provisions limiting liability were to be viewed merely as an attempt to relieve such a contractor from liability for its own fraud, the Government's argument [that the limitation of liability was void] might perhaps be unanswerable.
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> But this was not a conventional Government contract made under normal conditions; it was an unusual arrangement made to meet a crisis. . . . "The industrial units thus created are unique. * * * These plants embody a new and tripartite relationship among Government, labor, and management."

United States Cartridge Co., 198 F.2d at 464-65 (internal citation omitted). The contract in this case was a conven-

tional one for the remanufacture of helicopters almost entirely during peacetime, and Boeing was not subject to Government supervision or control. These differences suggest that the limitation of liability in *United States Cartridge Co.* allocated risks in a way much more favorable to the defendant than does the HVIC. In short, we do not read the HVIC as an agreement by the Government to assume the risk of damages to high-value items that it sustains because of FCA violations.

Boeing implores us to hold the Government to its contractual responsibilities and points us to the Fourth Circuit's recent decision in *United States v. Bankers Insurance Co.*, 245 F.3d 315 (4th Cir.2001), where the question on appeal was "whether the existence of an FCA claim precludes arbitration of a contract dispute involving the Government." *Id.* at 318. The contract dispute concerned a federal agency and a private insurance company that had agreed to arbitrate any misunderstandings or disputes. *Id.* at 317-18. The Government contended that the Attorney General was not bound by the arbitration agreement because (1) he had not been a party to the agreement, *id.* at 319, and (2) arbitration would impair his exclusive authority to enforce the FCA. *Id.* at 324. Unpersuaded by these arguments, the Fourth Circuit ultimately required the Government to submit to nonbinding arbitration before litigating the FCA claim. *Id.* at 324-25.

According to Boeing, the holding in *Bankers Insurance* that the Government must satisfy its contractual obligations supports the proposition in this case that the Government may comply with the HVIC only by refraining from seeking damages under the FCA. That the Government is bound by the contracts that its authorized officials sign is incontrovertible. However, we cannot as readily agree with the inference that Boeing draws from *Bankers Insurance* for the resolution of this case. The Fourth Circuit recognized that FCA claims are "premised on a unique statutory right" and explicitly noted that "the statutory authority of the Attorney

General [to enforce the FCA would] not [be] compromised by" making the Government honor its previous agreement to arbitrate. *Bankers Ins.*, 245 F.3d at 325. In other words, the contract in *Bankers Insurance* merely deferred the litigation of the FCA claim until the nonbinding arbitration process had been completed.

In this case, however, Boeing's interpretation of the HVIC would absolutely foreclose the Government from recouping anything more than a $10,000 civil penalty for damages sustained because of a false claim for a high-value item, when the damages sustained could be far greater than the general $100,000 threshold for such items. Given Congress's explicit recognition while amending the FCA "that a large number of fraud cases and many of the larger-dollar cases arise out of Department of Defense contracts," H.R.Rep. No. 99-660, at 20,[6] it strikes us as incongruous that the HVIC would relieve contractors for high-value items from the FCA's damages provision. After all, the motivating purpose of the FCA is to combat and to deter fraud, which would not be served in the context of defense contracts by the civil penalty alone.

In its brief, Boeing expounds at length on the negative implications, both fiscal and otherwise, of holding military contractors liable under the FCA for damages to high-value items. We agree with the Government and Roby that we should leave any revision of the FCA or the HVIC to Congress. In the case before us, Boeing was contractually

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[6] *See also* S.REP. No. 99-345, at 2-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267 ("In 1985, the Department of Defense Inspector General, Joseph Sherick, testified that 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses. Additionally, the Justice Department has reported that in the last year, four of the largest defense contractors, General Electric, GTE, Rockwell and Gould, have been convicted of criminal offenses while another, General Dynamics, has been indicted and awaits trial." (citations omitted)).

required to ensure the quality of the parts used for the remanufacture of the Army's helicopters; its failure to do so resulted in the Government's acceptance and use of a helicopter that was not flight-ready and the subsequent loss of the helicopter. The HVIC does not foreclose the FCA as a means for the Government to recover damages for the loss of Aircraft 89-0165.

C. FCA Damages

The crux of this case is the appropriate measure of damages under the FCA, which simply provides for "3 times the amount of damages which the Government sustains because of the act of th[e] person" who submitted the false or fraudulent claim. 31 U.S.C. § 3729(a). We have previously observed that FCA damages "typically are liberally calculated to ensure that they 'afford the government complete indemnity for the injuries done it.'" *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 304 (6th Cir.1998) (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549, 63 S.Ct. 379, 87 L.Ed. 443 (1943)). "[T]he government is entitled to full damages where it proves it received no value at all." *Id.*

In *Marcus*, the Supreme Court indicated that "restitution to the government of money taken from it by fraud" was the motivating purpose of the FCA; therefore, "the device of [then-] double damages plus a specific sum was chosen to make sure that the government would be made completely whole." *Marcus*, 317 U.S. at 551-52, 63 S.Ct. 379. Three decades later, in *United States v. Bornstein*, 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976), the Supreme Court understood the baseline to be "the Government's actual damages," measured as "equal to the difference between the market value of the [goods] it received and retained and the market value that the [goods] would have had if they had been of the specified quality." *Id.* at 316 & n. 13., 96 S.Ct. 523 The Bornstein Court favored this formula because it

"maximizes the deterrent impact of the [then-] double-damages provision and fixes the relative rights and liabilities of the respective parties with maximum precision." *Id.* at 317, 96 S.Ct. 523.

In this case, the district court held that the Government could recover damages under the FCA that were "the direct, proximate, and foreseeable result of the claims submitted by" Boeing for Aircraft 89-0165; Boeing had argued that its liability at most was limited to "the price of a fully-conforming transmission gear." *Roby II*, 79 F.Supp.2d at 895. On appeal, Boeing continues to maintain that "the proper measure of direct FCA damages is the amount wrongfully paid on the claim," Reply Br. at 23, or the value of the defective Speco gear. However, Boeing now concedes that damages under the FCA could equal—but never exceed—the amount of the claim, which in this case would be the approximately $4.1 million value of Boeing's contract to remanufacture Aircraft 89-0165.

Negotiation strategy aside, we are at a complete loss as to how Boeing can understand "the amount wrongfully paid" to be limited to "the portion of the contract price allocated to the defective gear." Reply Br. at 21. According to our reading of the contract and the subsequent invoice, Boeing billed the Government for the remanufactured helicopters as units, not as assemblages of assorted parts. *Cf. Bornstein*, 423 U.S. at 307, 96 S.Ct. 523 (invoices for radio kits that contained falsely marked electron tubes "included claims for payment for the falsely marked tubes"). The fact that every component but one conformed to contract requirements is not legally significant when the defective gear was "flight critical" and thus necessary for flight. Because the Speco gear was defective, Aircraft 89-0165 was defective, making Boeing's entire claim for payment false for the purposes of the FCA.

This understanding of Boeing's FCA violation informs our analysis of how to calculate damages under the FCA. Under the "diminished value" or "benefit of the bargain" test, which Boeing cites as controlling, we subtract the market value of what the Government received from what it was promised.[7]

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[7] *See generally* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 3.01[D][1], at 3-34 to 3-35 (2d ed. Supp.2002). The facts of *Bornstein*, where the Supreme Court articulated this rule, are similar to those of this case and deserve some attention. *Bornstein* involved a Government contract for radio kits, which were to contain electron tubes of a certain quality. *Bornstein*, 423 U.S. at 307, 96 S.Ct. 523. The subcontractor who supplied these tubes sent tubes that were falsely marked as meeting the Government's specifications. *Id.* The contractor then incorporated the falsely marked tubes into the radio kits and shipped them to the Government. *Id.* The contractor's invoices were thus false because they "included claims for payment for the falsely marked tubes that had been supplied" by the subcontractor. *Id.* After recovering damages for the tubes from the contractor, presumably by settlement, the Government brought an FCA action against the subcontractor. *Id.* at 307-08, 96 S.Ct. 523. In holding "that the Government's damages should be doubled [as the FCA then provided] before any compensatory payments are deducted," *id.* at 314, 96 S.Ct. 523, the *Bornstein* Court stated that those damages were "equal to the difference between the market value of the tubes it received and retained and the market value that the tubes would have had if they had been of the specified quality." *Id.* at 317 n. 13, 96 S.Ct. 523.

We recount these facts in detail because the similarity between *Bornstein* and this case might prompt the all-too-easy substitution of "gear" for "tubes" in the equation quoted above. In both cases, the claim for payment was false because of a defective part that a subcontractor had supplied. However, as the district court correctly noted, "*Bornstein* was concerned only with the issue of damages and penalties against a subcontractor who causes the prime contractor to submit false claims." *Roby II*, 79 F.Supp.2d at 893 n. 47. The defendant in this FCA action, of course, is Boeing, not Speco. We cannot know why the Government settled with the contractor in *Bornstein* for only the cost of the falsely marked tubes when it had contracted and paid for radio kits—perhaps the tubes did not affect the reliability of the radios. *See Bornstein*, 423 U.S. at 318-20, 96 S.Ct. 523 (Rehnquist, J., concurring in part and dissenting in part) (describing the subcontractor's scheme). In this case, however, the

That the contract in this case was for the remanufacture rather than the sale of a helicopter gives us some pause, but ultimately does not affect the issue before us.[8] We will therefore frame the following discussion in terms of the market value of remanufactured helicopters.

Under *Compton*, the market value of Aircraft 89-0165 as delivered was zero. Boeing, of course, would disagree, and we are aware of the fact that the Army did get fifty-six hours of flight time from the helicopter, when the warranty was good for two-hundred flight hours. However, as we concluded in *Compton*:

> [A] setoff based on value purportedly received would create a perverse incentive system in which government contractors could endanger the lives of American soldiers by providing substandard materiel, and the Army would be deterred from correcting the danger because it would be forced to bear the cost of any use it received from the substandard goods before their defects were discovered.

Compton, 142 F.3d at 305 n. 8. We believe that this policy argument, which was compelling with respect to untested jeep brake-shoe kits, *id.* at 297-98, has even more force in the context of this case.

Compton is not as helpful in determining the market value of Aircraft 89-0165 as promised. In *Compton*, we held that the Government could recover the contract price because

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Speco gear was not simply of lesser quality than specified; it was a defective flight-critical part, which made the loss of Aircraft 89-0165 inevitable.

[8] Again, we note that the question certified for appeal is "[w]hether the [Government] can recover damages under the [FCA] for loss of a helicopter resulting from the failure of a defective flight-critical component part." J.A. at 214. The answer to this question does not depend on whether the underlying contract was for remanufacture or sale.

damages were the same whether we applied the diminished-value test, as the defendant urged, or the Uniform Commercial Code's rejection provision. *Id.* at 305. However, contrary to Boeing's reading of the case, *Compton* does not necessarily signify that the recovery of damages in FCA cases is "limited to the contract price originally paid." Reply Br. at 26. Although the Government apparently did not claim that its full or actual damages were more than the contract price in *Compton*, it does so in this case.

Boeing characterizes the Government's claim as one for replacement costs, which it argues are consequential damages and thus unrecoverable under the FCA. We think that this characterization confuses the issue. Under the diminished-value test that Boeing itself favors, actual damages depend on "market value." *Bornstein*, 423 U.S. at 317 n. 13, 96 S.Ct. 523. Boeing conflates market value and contract price, but the concepts are clearly distinct. *Cf.* U.C.C. § 2-713 (2001) ("[T]he measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price . . ."). In this case, the Government contracted for Aircraft 89-0165 to be remanufactured to specific standards. The helicopter as received by the Government did not meet those specifications. Therefore, the Government's damages equal the difference between the market value of Aircraft 89-0165 as received (zero) and as promised. We do not presume to estimate the market value of a remanufactured helicopter. For our present purposes, we answer the question certified for interlocutory appeal in the affirmative—that is, the Government may recover damages under the FCA for the loss of a helicopter that results from the failure of a defective flight-critical component part. We note that these damages do not represent replacement costs.[9] Because the Government did

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[9] The Federal Circuit has observed that the diminished-value test is "the normal measure of damages" in FCA cases but held that "[i]n the

not contract for a new helicopter, it may not recover the roughly $13 million value of the helicopter bought to replace the destroyed Aircraft 89-0165. However, it may recover the benefit of its bargain with Boeing, which would be the value that Aircraft 89-0165 would have had if it had been of the specified quality.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

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unusual case in which actual loss in value cannot be ascertained, the injured party may recover the replacement cost, but only if that cost is not clearly disproportionate to the probable loss in value caused by the defects in question." *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1372-73 (Fed.Cir.1998). "The cost of remedying defects is not regarded as disproportionate if the defects significantly affect the integrity of a structure being built. In that setting, the injured party is entitled to recover the cost of remedying the defects despite the fact that the cost may be very high." *Id.* at 1372.

So instructed, we observe that if the actual loss in Aircraft 89-0165's value could not be ascertained, then the Government would be entitled under *Commercial Contractors* to recover the very high cost of replacing the downed helicopter, because the defect concerned a flight-critical gear and significantly affected the structural integrity of the helicopter.

BOGGS, Circuit Judge, dissenting.

I respectfully dissent from the court's restrictive reading of the HVIC and its resultant holding that the Government can sue Boeing under the FCA to recover damages for Aircraft 89-0165.

As the court admits, the HVIC "limits contractor liability for high-value items in *fairly broad terms*." Majority Op. at 643 (emphasis added). The plain language of the HVIC states that, with limited exceptions that the parties agree are not applicable to the present case, "the Contractor shall not be liable for loss of or damage to property of the Government . . . that (1) occurs after Government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies." 48 C.F.R. § 52.246-24. Put most simply, this case is about the Government trying to do exactly what the plain and obvious wording of its contractual term says it will not do: recover from "the Contractor" for the "loss of or damage to property of the Government."

The court's holding—that the Government can seek under the FCA exactly what it has contracted through the HVIC not to—flows in large part from the inherent tension the court sees between the FCA and the HVIC. The court states well the history and purpose of each—the FCA was adopted to combat fraud perpetrated on the Government by its contractors, and the HVIC is included as a self-insurance provision in certain Government procurement contracts to limit the insurance that contractors must acquire (and the resultant costs those contractors pass on to the Government). Majority Op. at 641-42. The court then explains that if the HVIC is given a natural reading, it will conflict with the goals of the FCA. Majority Op. at 645.[1]

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[1] I note that the court mentions in passing the district court's reading of the HVIC, which would alleviate any perceived tension between the

However, the court unnecessarily complicates the case. Contrary to the court's reading, the FCA and HVIC can easily be read in harmony. The HVIC does not overwrite or preempt the FCA by relieving contractors of liability for fraud. The FCA is still applicable to the contractors; the only difference made by the HVIC is that the Government has agreed that it will not hold the contractors liable under any theory for the value of the helicopter. Accordingly, the Government can sue the contractors under the FCA and seek a finding of liability for fraud; the Government merely can not seek damages for the value of the equipment. The other penalties under the FCA are still applicable, and if the Government feels that it has been defrauded, it may debar

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HVIC and the FCA by limiting the HVIC's effect to only *contractual* remedies; in this reading, the HVIC would be completely inapplicable to the Government's *statutory* remedy under the FCA. Majority Op. at 642 (citing *Roby I*, 73 F.Supp.2d at 910). To the extent that the court relies on this distinction, it appears incorrect. First, while the word *contractual* is used to modify the remedies limited by the HVIC in its enabling regulation, that modifier does not appear in the form contract language set out in the regulations, 48 C.F.R. § 52.246-24, or in the parties' contract (which incorporated the form language). Therefore, the clause as it appears in the parties' contract facially covers *all* remedies. Second, the word *contractual* as used in the enabling regulation for the HVIC is open to interpretation. In addition to the definition the district court gave it, that its protection only applies to contract remedies the Government might have against Boeing, the use of the word *contractual* might merely be shorthand for any remedies that come out of the relationship embodied in the contract. Indeed this broader reading is more in line with the history of the HVIC. For example, in the case that prompted the Government to turn its unwritten practice of self-insurance into a formal rule, *Australia v. Lockheed Aircraft Corp. & Menasco Mfg. Co.*, No. 69-1623-WPG (C.D.Cal. Jan. 10, 1972), the practice was discussed as a defense to contract, products liability, and negligence claims. Obviously neither negligence nor products liability claims are contract remedies in the narrow sense; they do not arise from a contract, just as a fraud claim does not. However, they can all arise out of a relationship between the parties that is based in a contract.

Boeing from Government contracts. In short, the better reading of the HVIC is as an assumption of risk clause; the Government has contractually agreed to assume the risk of the loss of the helicopter, and while legal means remain open to the Government against Boeing (including that pursuant to the FCA), the Government can not seek recompense for the value of the equipment.[2]

There is support in both the wording and purpose of the HVIC for enforcing a natural reading of the contractual clause—that the Government has contracted away its right to seek property damages from suppliers of high-value items.

First, the wording of the HVIC supports the proposition that it was intended in the usual case to protect contractors from Government actions utilizing a fraud theory. Pursuant to it, contractors are not liable for any damages for the loss of a high-value item caused by a product defect, unless one of the few listed exceptions applies. As the court points out, one of those exceptions is for "willful misconduct or lack of good faith" on the part of managerial personnel. Majority Op. at 643 (citing FAR § 52.246-24(b)). Though not using the word "fraud," willful misconduct and a lack of good faith fairly

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[2] Contrary to the court's contention, the argument that the Government can contract away part of its rights under the FCA is supported by the recent Fourth Circuit decision in *United States v. Bankers Insurance Co.*, 245 F.3d 315 (4th Cir.2001). In that case, the Government was held to an arbitration agreement contained in a contract it had signed when the Government sought instead to bring an FCA action in court against the other party to the contract. The court tries to distinguish *Bankers Insurance* by noting that the contract at issue in that case permitted the Government the unfettered right to sue under the FCA after it engaged in the required arbitration. Majority Op. at 645. Nevertheless, the reasoning of *Bankers Insurance* still applies to the case at hand: "[T]he Government has no special right to ignore its contract responsibilities. The Government should comply with its contract obligations, and it cannot avoid them merely by invoking a statutory civil claim, such as one contemplated under the FCA." *Bankers Insurance*, 245 F.3d at 324.

describe fraud. Therefore, the HVIC expressly exempts from protection losses due to fraud on the part of managerial personnel. The negative pregnant, therefore, would be that the HVIC does protect contractors from losses due to non-managerial fraud (which the parties have stipulated to be the extent of the fraud, if any, in the present case).

Second, the purpose of the clause supports the proposition that it was intended to provide protection no matter the legal theory. In order to explain why, however, I provide a slightly broader history of the HVIC.

As the district court in this case explained, the clause represents a long-standing Department of Defense (DOD) practice of self-insuring for damage to high-value items. *See Roby I*, 73 F.Supp.2d at 908-09. At first it was just a practice, under which the DOD would not hold manufacturers liable for the loss of this type of equipment, regardless of whether the DOD found any fault, negligence, or breach of warranty to have occurred on the part of the manufacturer. *Id.* at 909. Then, in the 1960s, the landing gear on an airplane purchased by the United States military and resold to the Australian Navy failed, resulting in the destruction of the plane. The Australian government sued the manufacturer, seeking tort, contract, and products liability damages. *Ibid.* Referring to the long-standing practice of the Government self-insuring against the loss of military equipment, a California district court found that the United States Navy could have been estopped from pursuing any claim based on the loss of the aircraft, because the airplane industry was aware of and relied upon this practice. *See Australia v. Lockheed Aircraft Corp. & Menasco Mfg. Co.*, No. 69-1623-WPG (C.D.Cal. Jan. 10, 1972). Specifically, the court found that the self-insurance practice had two central purposes: (1) to encourage manufacturers not to obtain liability insurance, the cost of which would be passed on to the Government; and (2) to encourage the manufacturers to cooperate fully in investigating the cause of equipment failures. *Id.* at 2-3.

As the district court in this case pointed out, around this time, the United States Commission on Government Procurement issued a report stating similarly, that defense contractors had long "[u]nderstood that the general practice of the government in military contracting was to accept the risk for loss or damage. . . ." *Roby I*, 73 F.Supp.2d at 909. Still, the *Menasco* case shook the faith of Government contractors in the protection offered by the unwritten policy. In response, in 1971, the DOD issued *Defense Procurement Circular 86*, which, as the court notes, put in writing this limited liability. Majority Op. at 642 n. 2.

The original 1971 version of the DOD's self-insurance policy stated that the clause did not apply "when the defects or deficiencies in such supplies . . . resulted from fraud or gross negligence as amounts to fraud, on the part of *any personnel of the Contractor*." DPC 86 at 4 (emphasis added). However, as the court notes, defense industry representatives warned that this would defeat the purpose of the clause, and when the clause was reissued in 1974, the phrase had been removed. Majority Op. at 643 n. 4. It was replaced with a more limited exception, which—much like the one in the current HVIC—excluded only "willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, . . . managers, superintendents, or other equivalent representatives. . . ." ASPR 7-104.45 (July 1, 1974).

Importantly, the Government made this change expressly recognizing its effect. In a memorandum discussing proposed revisions to the HVIC, the Armed Services Procurement Regulations Committee, which promulgated the HVIC, explained that the removal of the original fraud provision would "eliminate contractor's [sic] responsibility for damage to Government Property resulting from defective items and caused by the fraud or gross negligence as amounts to fraud of any personnel of the contractor." J.A. at 652 (January 14, 1972). In 1984, the HVIC regulation relevant to this case

became effective and provides substantially the same protection to military contractors providing high-value items. *See* 48 C.F.R. § 52.246-24.

From its history, it is clear that the DOD's self-insurance policy was intended to preclude liability for the loss of certain Government equipment—even when such loss was the result of non-managerial fraud—so that contractors would not purchase liability insurance, which otherwise would be costly and would be a cost passed on to the Government. The plain language of the HVIC at issue in the present case conforms to that purpose. However, the court's decision today does not; under it, contractors will have to insure against potential FCA liability for treble damages for the loss of high-value items resulting from actions that might be held to be fraudulent on the part of any personnel. Presumably, this cost will be passed on to the Government.

In sum, the court today holds that the HVIC does not apply in a situation wherein its plain terms and historical purpose seem to suggest it does apply—a contractor being held liable to reimburse the Government for the loss of a high-value item. Now, the Government argues that this case is not about recovering the amount lost when the helicopter was destroyed, but is instead about holding Boeing responsible for fraud. However, if the Government were really only concerned about fraud, it could seek the other penalties possible under the FCA or debar Boeing from participation in future Government contracts. Instead, the Government seeks trebled payment for the helicopter.

As explained above, if this court had held the HVIC applicable to Government actions for reimbursement under the FCA, it would not have been overriding or preempting the FCA. It would, instead, merely have been upholding the obvious coverage of a standard assumption of risk clause, under which the Government agreed not to exercise certain rights it would otherwise have in exchange for a benefit.

This court would not have been holding that the FCA can not be relied upon by the Government; it would merely have been saying that the Government, in accordance with the express language and historical purpose of the HVIC, can not seek compensation for the loss of the helicopter under any theory, including under the FCA. Because the court does not so hold, I must respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT,
S.D. OHIO,
WESTERN DIVISION.

No. C-1-95-375.

UNITED STATES OF AMERICA ex rel. BRETT ROBY,
Plaintiff,

v.

THE BOEING COMPANY,
Defendant.

Dec. 30, 1999.

ORDER

SPIEGEL, Senior District Judge.

This matter is before the Court on Defendant's Cross-Motion for Partial Summary Judgment as to the Measure of Damages (doc. 340); Government's Response (doc. 366); Relator's Response and Cross-Motion for Summary Judgment as to the Measure of Damages (doc. 367); Defendant's Reply (doc. 401); Aerospace Industries of America, Inc's Motion in Support of Defendant's Cross-Motion as to the Measure of Damages (doc. 402); Relator's Reply (doc. 432); and Defendant's Motion Requesting the Court to Rule on Defendant's Cross-Motion for Partial Summary Judgment as to the Measure of Damages (doc. 556).

BACKGROUND

On May 22, 1995, Relator Brett Roby (hereinafter, "Relator") filed this action under seal pursuant to Title 31

U.S.C. § 3730(b) on behalf of himself and the United States Government (hereinafter, "the Government" or "the United States") in the United States District Court for the Southern District of Ohio (doc. 2). Relator alleges that The Boeing Company (hereinafter, "Boeing" or "Defendant") and its supplier, The Speco Corporation (hereinafter, "Speco"),[1] violated the False Claims Act, Title 31 U.S.C. § 3729, *et seq.*, by manufacturing and selling defective transmission gears to the United States via Boeing's CH-47(D) Chinook Army helicopters[2] (hereinafter, "CH-47(D) helicopters") (*Id.*). On April 30, 1997, the Government intervened and filed an Amended Complaint against Boeing (doc. 34). In the Amended Complaint, the Government alleges that Speco manufactured defective, transmission gears at its Springfield, Ohio facility before Boeing installed the gears in the CH-47(D) helicopters, and, thereafter, supplied the gears to the United States Army (*Id.*). The Amended Complaint was unsealed on May 1, 1997.

Government and Relator allege in Count I of the Amended Complaint that Defendant submitted false claims under Title 31 U.S.C. § 3729-3133, as amended by Pub.L. 99-562, 100 Stat. 3153 (1986) (doc. 34). Specifically, the Government contends that in 1991, one of the Speco-made gears failed in flight, while in service in Saudi Arabia, leading to the total loss of a CH- 47(D) helicopter and all of its contents, at an

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[1] Although Speco was initially a party to this action, as the original maker and supplier of the gears in question to Boeing, Speco filed for bankruptcy during the course of the present litigation. The trustee appointed by the United States Bankruptcy Court subsequently settled this action with the Government and Relator, with the approval of the bankruptcy court on behalf of Speco and its creditors.

[2] The CH-47(D) Chinook helicopter is the Army's medium, tactical, heavy-lift, and transport helicopter, and is normally operated and crewed by a total of four soldiers (doc. 34).

estimated loss of approximately $10 Million (*Id.*).[3] In addition, the Government alleges that in 1993 another Speco-made gear failed in another helicopter incident resulting in a hard landing near Ft. Meade, Maryland,[4] causing approximately $1 million in damage to that helicopter (*Id.*).[5] Relator alleges that at a total cost to the United States of about $2,100,000,000, Boeing re-manufactured the Army's fleet of Chinook CH-47 A/B/C model helicopters into Chinook CH-47(D) and MH47D/E helicopters, and the contracted work to those helicopters was performed in an "incompetent and dangerous manner" by Defendant (doc. 367). Moreover, Relator asserts that each of these "unsuitably, re-manufactured helicopters" were delivered by Boeing to the Government by operation of a claim for payment in the form of a "Standard Form DD-250" that falsely represented that

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[3] Specifically, Relator asserts that "Aircraft 89-0165" (a CH-47(D) helicopter) was shipped by the Army, after delivery from Boeing, to the Persian Gulf for use in Operation Desert Shield/Desert Storm (doc. 367). Relator alleges that on January 11, 1991, during its 56th hour of operation, the defective transmission gear exploded, causing Aircraft 89-0165 to crash and catch fire (*Id.*). The resulting fire consumed the entire helicopter, a HMWWW truck, ammunition, and various essential equipment, including a howitzer and its tow vehicle (*Id.*). Relator contends that the United States Army replaced Aircraft 89-0165 by buying a new CH-47(D) fully-equipped helicopter at a replacement cost of more than $12.7 million (*Id.*).

[4] Relator submits that approximately eighteen months after the Saudi crash, and a year after Boeing reinspected the Speco-made gears, another transmission gear also broke due to a grinding crack and proximately caused the second helicopter incident at Ft. Meade, Md. (doc. 367). Relator alleges that about a half-a-dozen more Speco-made gears were pulled from service or inventory as a result of the 1993 Ft. Meade incident (*Id.*).

[5] Although there were reported injuries and the loss of military equipment associated with the helicopter incidents in question, there were no reported fatalities in either the Saudi crash or the Ft. Meade hard landing (*Id.*).

the contracted helicopters conformed to all of the specified contract requirements (*Id.*). Relator avers that it has evidence that Defendant acted in a reckless manner by installing the defective gears without adequate inspection (*Id.*). For example, Relator alleges that Boeing for at least ten years prior to the Saudi crash had prior knowledge that the transmission helicopter gears were prone to certain grinding cracks and breakage (*Id.*). Relator further alleges that the material from which the gears were made are especially susceptible to exactly the kind and type of burning and cracking that resulted in the crash of Aircraft 89-0165 (*Id.*).

Moreover, the Government and Relator aver in the Amended Complaint that "[b]y virtue of the acts described above, Boeing, by and through its officers, agents, and employees, knowingly submitted, and caused to be submitted, false or fraudulent claims for payment or approval to [its] officers, employees, or agents of the United States Government" (doc. 34). The Government concludes Count I with the contention that "[b]y reason of these payments made upon these false claims, the United States Government has been damaged as a result of Defendant's violations of the False Claims Act, arising under 31 U.S.C. §§ 3729(a)(1), (2), (3) & (7), for damages to be determined at trial . . . ." (*Id.*).

The Amended Complaint further asserts claims against Defendant for: (1) payment by mistake, (2) unjust enrichment, (3) breach of contract, and (4) common law fraud (doc. 34). The Government seeks to recover treble damages based on the value of the first CH-47(D) helicopter and its contents, for the cost of repairing the second aircraft, and to treble those damages under the False Claims Act of 1986 (*Id.*).[6] In addition, the Government asserts that it is entitled to treble

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[6] Relator asserts that Boeing paid Speco $4,874 for the cost of the defective gear involved in the Saudi crash, which Relator estimates to be less than one percent of the Government's actual loss (doc. 367).

damages for the delivery of other U.S. Army Chinook helicopters with allegedly non-conforming engine transmission gears that were manufactured by Speco from 1987 to 1995,[7] and statutory penalties of $5,0000 to $10,000 for the submission of each purportedly false claim for the helicopters in question (*Id.*).

In its Answer, Defendant submits a general denial of the Government's allegations of false claims, violations of the False Claims Act, and the resulting compensatory and statutory damages (doc. 161). Defendant defends by originally asserting a total of twelve (12) affirmative defenses that would individually or collectively relieve Defendant of all liability from the Government's claims (*Id.*).[8] Specifically, Defendant's Fifth Affirmative Defense states that the "United States cannot recover damages under the False Claims Act for the two helicopters, or their contents, which the [G]overnment alleges were lost or damaged as a consequence of defective parts . . . ." (doc. 340). Defendant asserts that the False Claims Act precludes recovery for product defects,

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[7] The Government contends that while the cost of the remanufactured helicopter involved in the Saudi crash was estimated at about $4 million, the cost for its replacement was well over $12 million (doc. 34).

[8] Defendant asserts the following affirmative defenses to the allegations set forth in the Amended Complaint: (1) failure to state a claim upon which relief can be granted; (2) the fraud cause of action is time-barred; (3) the damages sought are barred by the High-Value Items Clause; (4) estoppel due to the High-Value Items Clause; (5) consequential damages are not available; (6) no injury; (7) failure to plead fraud with particularity; (8) laches; (9) express contract; (10) special damages are not pled with specificity; (11) punitive damages are not pled with particularity; and (12) equitable estoppel (doc. 161). Note: Defendant's Third Affirmative Defense, the High-Value Items Clause, was dismissed pursuant to this Court's Order of November 2, 1999 (doc. 554).

consequential damages [9], or any other recovery not found in the statute itself (*Id.*).

On February 5, 1999, Defendant filed a Cross-Motion for Partial Summary Judgment as to the Measure of Damages (doc. 340) asserting that consequential damages are not recoverable under the False Claims Act. Thereafter, the Government filed a Response (doc. 366), Relator followed with his Response and Cross Motion for Summary Judgment as to the Measure of Damages (doc. 367), and Defendant filed its Reply on May 28, 1999 (doc. 401). Shortly thereafter, Relator filed his Reply (doc. 432). In addition, this Court heard oral arguments on the issue of consequential damages in relation to the False Claims Act on June 2, 1999 (doc. 444). On November 2, 1999, this Court issued an Order granting Aerospace Industries of America, Inc.'s (hereinafter, "Aerospace") an appearance in this action as *Amicus Curiae* and this Court will consider Aerospace's Motion in Support of Defendant's Cross-Motion for Partial Summary Judgment (doc. 402) in the Court's rulings on this matter. In addition, in our November 2nd Order, the Court also dismissed Defendant's Third Affirmative Defense, the High-Value Items Clause, and granted the Government's and Relator's motion for partial summary judgment on that issue (doc. 296) (*Id.*).[10] Finally, on November 12, 1999, Defendant filed a Motion Requesting the Court to Rule on Boeing's Cross-

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[9] Defendant argues that the Government's alleged replacement cost of over $12 million for the Saudi helicopter is considered to be consequential damages under the False Claims Act (doc. 340). Therefore, even if Defendant is found liable for submitting a false claim for the defective gears to the Government, Defendant avers that, it would be at most liable to the Government for the cost of the gears, and not the consequential damages that allegedly follows the submission of the false claim (*Id.*).

[10] *See United States ex rel. Roby v. Boeing Co.*, 73 F.Supp.2d 897, 912 (S.D.Ohio 1999) (doc. 554).

Motion for Partial Summary Judgment as to the Measure of Damages (doc. 556).

The Court believes it is important to note that, this Order will only address the primary issue of the applicability of Defendant's Fifth Affirmative Defense, which states that, "consequential damages are not recoverable under the False Claims Act" (doc. 340). Furthermore, any issues concerning the merits of the Government's and Relator's claims, or Defendant's remaining affirmative defenses will not be addressed by the Court in this Order. The Parties stipulate that for the purpose of summary judgment only, the Court may assume that liability against Defendant could be proven by the Government and Relator by a trial on the merits (docs. 340, 366 & 367). The Parties now move this Court to decide the purely legal question of what is the proper measure of damages in relation to the False Claims Act, and, specifically, are consequential damages available under the Act.

STANDARD OF REVIEW

The narrow question that we must decide on a motion for summary judgment is whether there exists a "genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The Supreme Court elaborated upon the appropriate standard in deciding a motion for summary judgment as follows:

> [T]he plain language of Rule 56© [sic] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case. Id. at 321, 106 S.Ct. 2548;

Guarino v. Brookfield Township Trustees, 980 F.2d 399, 405 (6th Cir.1992); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989). If the moving party meets this burden, then the non-moving party "must set forth specific facts showing there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see Guarino*, 980 F.2d at 405.

As the Supreme Court stated in *Celotex*, the non-moving party must "designate" specific facts showing there is a genuine issue for trial. *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548; *Guarino*, 980 F.2d at 405. Although the burden might not require the non-moving party to "designate" facts by citing page numbers, "'the designated portions must be presented with enough specificity that the district court can readily identify the facts upon which the non-moving party relies.'" *Guarino*, 980 F.2d at 405 (quoting *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir.1989), *cert. denied*, 494 U.S. 1091, 110 S.Ct. 1839, 108 L.Ed.2d 967 (1990)).

Summary judgment is not appropriate if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Conclusory allegations, however, are not sufficient to defeat a motion for summary judgment. *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir.1990).

DISCUSSION

I. *Introduction To The False Claims Act*

A. *The "Qui Tam" Provisions of the FCA* [11]

The False Claims Act (hereinafter, "the FCA"), which Congress originally enacted in 1863, is the government's "primary litigative tool for combating fraud" against the federal government. S.Rep. No. 99-345, 99th Cong., 2d Sess., at 2, reprinted in 1986 U.S.C.C.A.N. 5266. The Act authorizes both the Attorney General and private persons to bring civil actions to enforce the Act. 31 U.S.C. § 3730 (1999). Congress amended the FCA in 1986 to increase the financial and other incentives for private individuals to bring suits under the Act in the hopes of enlisting the aid of the citizenry in combating the rising problem of "sophisticated and widespread fraud." S.Rep. No. 99-345, at 2, 23-24 (1986).

Section 3730(b) of the FCA as now constituted provides that a person may bring a civil action for a violation of the substantive provisions of the Act "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). The action must be brought in the name of the government. *Id.* An action under this provision is termed a "*qui tam*"[12] suit, and the person who brings such an action is referred to as a

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[11] The following summary of the history of the FCA was compiled in its entirety by a review of the Congressional Record and from the relevant portions of the Seventh Circuit's decision in *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 745-46 (9th Cir.1993) (holding that a former employee of a government contractor who brought an action against the contractor under the *qui tam* provisions of the FCA, met the Article III standing requirements and did not violate the Due Process Clause of the U.S. Constitution).

[12] The term "*qui tam*" is short for "*qui tam pro domino rege quam pro se imposo sequitur*," which is interpreted as he "who brings the action as well for the king as for himself." *Bass Anglers Sportsman's Soc'y of America v. U.S. Plywood-Champion Papers, Inc.*, 324 F.Supp. 302, 305 (S.D.Tex.1971).

"relator" or "informer." *Id.* If the government files an action to enforce the FCA, a would-be relator may not later bring any action based on the same underlying facts. *Id.* § 3730(e)(3). Nor may a private party litigate a *qui tam* suit based on the public findings of a government investigation or on disclosures made in the news media, unless that party is an original and independent source of the information on which the complaint is based. *Id.* § 3730(e)(4)(A)-(B).

Upon bringing a *qui tam* action, a relator must serve on the government a copy of the complaint and written disclosure of substantially all material evidence and information the relator possesses. The complaint must be filed *in camera* and remain under seal for at least sixty (60) days so that the government may investigate the relator's allegations; though upon a showing of "good cause," the government may move the court for an extension of the sixty (60) day period. *Id.* § 3730(b)(2), (3). By the end of the period provided for the government to complete its investigation, the government must decide whether to intervene and proceed with the action, "in which case the action shall be conducted by the government;"[13] or whether to decline to take over the action, "in which case the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4)(B).

The original version of the FCA allowed anyone to bring a *qui tam* action and receive up to fifty percent (50%) of the amount recovered. S.Rep. No. 99-345, at 8-10 (1986). This broad provision led to abuse and in 1943, following the Supreme Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546-47, 63 S.Ct. 379, 87 L.Ed. 443 (1943),[14] Congress amended the statute. The 1943 version of

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[13] *Id.* § 3730(b)(4)(A).

[14] In *Marcus*, the Supreme Court held that a relator could bring a *qui tam* action even though the action was based entirely upon information contained in the government indictment. *Id.*, 317 U.S. at 547-48, 63 S.Ct. 379 (1943).

the FCA precluded actions "based on evidence or information the Government had when the action was brought." *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1153 (3d Cir.1991). This led to claims being barred even in cases where the *qui tam* supplied the information to the government before filing the claim. *See United States ex rel. State of Wis. v. Dean*, 729 F.2d 1100, 1106-07 (7th Cir.1984).[15]

In 1986, Congress again amended the FCA in order "to encourage any individual knowing of governmental fraud to bring that information forward." S.Rep. No. 99-345, at 2 (1986). According to the Third Circuit, in order "[t]o revitalize the *qui tam* provisions, the amendment provided incentives for private enforcement, including increased monetary awards, adopted a lower burden of proof, and allowed a *qui tam* to remain a party in the action even if the government intervenes." *Stinson*, 944 F.2d at 1154 (1991).

B. *FCA Case Law Applied*

As amended in 1986, the False Claims Act provides that the terms "'knowing and knowingly' mean that a person, with respect to information: (1) has actual knowledge of the information, (2) acts in deliberate ignorance of the truth or falsity of the information, or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." 31 U.S.C. § 3729(b).

The archetypal *qui tam* action is filed by an employee at a private company who discovers his employer has overcharged for services or supplies under a government contract. *See United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 968-69 (9th Cir.1995) (holding that a former employee of a federal contractor, who had signed a release of all claims

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[15] The holding in *Dean*, was subsequently superseded by statute in a number of states (including Illinois, California, Maryland, Oklahoma, Virginia, Wisconsin, and Vermont).

against the contractor in settlement of an earlier litigation, then the same employee brought a *qui tam* action against the same contractor under the FCA, and, nonetheless, was allowed to sue that contractor). However, FCA actions have also been sustained under theories of supplying substandard products or services;[16] false negotiation, including bid rigging and defective pricing;[17] and false certification[18].

In *United States v. Bornstein*, 423 U.S. 303, 311, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976), the Supreme Court reviewed the FCA in order to differentiate contracts from claims[19] that were submitted under contracts, holding that only the latter gave rise to liability under the FCA. The Supreme Court held that the defendant was liable under the statute because he engaged in conduct that caused the false claims to be submitted to the United States, and the Court explained that:

> [w]hile it is true that no false claims would have been submitted had [the defendant] and [its prime contractor] not entered into a contractual relationship, the entry into that relationship did not in itself cause the submission of

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[16] *See United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir.1972).

[17] *See United States v. Ehrlich*, 643 F.2d 634 (9th Cir.1981); *see also United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296 (6th Cir.1998).

[18] *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261 (9th Cir.1996).

[19] The term "claim" is defined in 31 U.S.C. § 3729 of the False Claims Act and provides, in pertinent part, that:

> [f]or purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property, which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Id. § 3729(c).

> any false claims . . . The language of the statute focuses on false claims, not on contracts.

Id. at 311 (1976) (discussing *Marcus*, 317 U.S. at 552, 63 S.Ct. 379 (1943)). Similarly, in *United States v. Ueber*, 299 F.2d 310, 313 (6th Cir.1962), the Sixth Circuit held that a cause of action under the FCA did not arise "until the first voucher seeking payment of the false claims was presented to the United States."[20] In another case, the Sixth Circuit explained that if the "government [is] seeking to state a claim under the FCA [the government] must allege a false claim for payment made upon the government, not merely a fraudulent contract." *Kaminski v. Teledyne Indus., Inc.*, 121 F.3d 708, No. 96-3620, 1997 WL 415314, at *4 (6th Cir. July 21, 1997).

II. *The Proper Measure Of Damages Under The False Claims Act*

A. *Introduction*

The amended FCA provides that any person who knowingly presents a false or fraudulent claim to the United States "is liable to the United States Government for a civil penalty . . . plus three (3) times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a) (1999).[21] The FCA itself does not specify how to quantify damages, but instead states that the Government should be awarded damages that it "sustains because of" the contractor's fraudulent acts. *Id.* § 3729(a),

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[20] *See also United States v. Ekelman & Assocs., Inc.*, 532 F.2d 545, 551-52 (6th Cir.1976) (stating that "no cause of action arises . . . until the [defendant] presents a claim to the [government] for payment . . . .").

[21] The FCA also contains an exception for those who voluntarily inform the government within thirty (30) days of learning of the false claim and were not subject to a governmental investigation prior to the disclosure to the government. Persons falling within this exception can limit their damages to two (2) times the amount of damages sustained by the government. *Id.*

(b) (1999). In *United States ex rel. Marcus v. Hess*, the Supreme Court established a simple "out of pocket" measure for the recovery of damages. 317 U.S. at 551-52, 63 S.Ct. 379 (1943). The Court found that damages under the FCA are intended to "provide for restitution to the government of money taken from it by fraud . . . ." *Id.* Trebling the damages and imposing penalties "was chosen to make sure that the government would be made completely whole." *Id.* The *Marcus* Court used a "but for" test in its analysis of FCA damages.[22] In other words, a court should ask the question of, "How much would the government have paid for the item at issue 'but for' the fraudulent actions of the defendant?"[23] This amount would be the proper measure of damages according to the *Marcus* court. *Id.* at 551-52, 63 S.Ct. 379 (1943).

Because each case under the FCA involves unique types of damage to the government, a formula for calculating damages must be created for each case that will provide the government with its damages directly caused by the filing of a false claim. *BMY—Combat Systems Div. of Harsco Corp. v. United States*, 44 Fed.Cl. 141, 147-48 (Fed.Cl. 1999). In addition, the Ninth Circuit Court of Appeals found that "[o]rdinarily the measure of the government's damages would be the amount that it paid out by reason of the false [claims] over and above what it would have paid if the claims had been truthful." *United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir.1966). In *United States v. Bornstein*, the Court applied a similar "benefit of the bargain" approach to calculating damages in FCA cases. 423 U.S. at 317 n. 13, 96 S.Ct. 523 (1976). The Supreme Court held that "[t]he Government's actual damages are equal to the difference between the market value [of the item] it received and retained, and the

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[22] *See* Michael A. DiSabatino, *Measure and Elements of Damages Under the False Claims Act*, 1977 WL 45669, 35 A.L.R. Fed. 805 (1977).

[23] *Id.*

market value [that the item] would have had if they had been of the specified quality." *Id.*[24] The *Bornstein* Court cited *United States v. Ben Grunstein & Sons Co.*,[25] as a basis for its choice of the "benefit of the bargain" or "market value" approach. *Id.* The district court in *Grunstein* defined the proper measure of damages as "the value of the property which the person defrauded would have received but for the fraud, less, as a credit, the value of the property which he has in fact received." *Id.*, 137 F.Supp. at 205 (1955).

Courts which have decided the issue thus far have confined their decisions to the particular type of fraud involved in each case. While the Supreme Court in *Bornstein* used a "benefit of the bargain" theory of damages, it did not overturn the "out of pocket" measure applied by the *Marcus* Court; which would infer that the Supreme Court will consider any reasonable method of calculating damages which will fairly reimburse the government for its losses and expenses, without creating a windfall for the government. *See Daff v. United States*, 31 Fed. Cl. 682, 695 (1994) (awarding as FCA damages the government's inspection and repair costs when the contractor had fraudulently concealed the failure of the product to pass the contractually required tests).[26]

We will now review the case law on consequential damages as applied in the federal courts. In the Fifth Circuit case that is highlighted in the next section, the court held that

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[24] This is also referred to as a product's "diminished value," and is measured by calculating the fair market value of the product(s) the government contracted to buy less the fair market value of the product(s) that was actually received and retained. *See* C. Stanley Dees, *Beyond "Diminished Value": New Challenges in the Law of Civil False Claims Act Damages*, 25 Pub. Cont. L.J. 597, 599 (1996). However, in cases in which the market value of the product(s) is speculative, the court may utilize the contract price to establish damages. *Id.*

[25] 137 F.Supp. 197, 205 (D.N.J.1955).

[26] *See also* Anna Burke, *Qui Tam; Blowing the Whistle for Uncle Sam*, 21 Nova L.Rev. 869, 911 (1997).

the government could not recover consequential damages resulting from the delivery of defective goods under a FCA theory of recovery.[27]

B. *United States v. Aerodex and Consequential Damages*

Questions regarding the meaning of "damages" under the FCA have their roots in the old act, which contained language virtually identical to the current damages provision.[28] The scope of the term "damages" was first addressed in the seminal case of *United States v. Aerodex*. In *Aerodex*, defendants were found civilly liable under the FCA for knowingly delivering contractually nonconforming ball bearings to the Navy Department. *Id.* 469 F.2d at 1013 (1972). Under its contract, Aerodex had delivered 300 nonconforming bearings at a price of $90 each for a total contract price of $27,000. *Id.* at 1006. The Navy subsequently

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[27] The following excerpt on the common law rule of contract damages is taken from the contract treatise of John D. Calamari, *The Law of Contracts* § 14.5 (4th ed.1998):

The Rule of Hadley v. Baxendale—

(a) *Economic Injury*—Prior to 1854 there were almost no rules of contract damages. The assessment of damages was for the most part left to the unfettered discretion of the jury. In 1854, *Hadley v. Baxendale* was decided. 156 Eng. Rep. 145 (1854). It has won almost universal acceptance in the common law world and remains the leading case in the field. Under the first rule of *Hadley v. Baxendale*, certain damages will so naturally and obviously flow from the breach that everyone is deemed to contemplate them. Frequently such damages are known as "general damages." Under the second rule, less obvious kinds of damages are deemed to be contemplated if the promissor knows, or has reasons to know, the special circumstances which will give rise to such damages. Such damages are frequently known as "special" or "consequential damages."

Id.

[28] *See* Michael Waldman, "*Damage Control*": *A Defendant's Approach to the Damage and Penalty Provisions of the Civil False Claims Act*, 21 Pub. Cont. L.J. 131, 136 (1992).

discovered the product substitution, removed the ball bearings and replaced them at a cost of $160,000. *Id.* In assessing damages, the district court included not only the contract price the Navy paid, $27,000, but also the $160,000 in "repair costs." *Id.*

The Fifth Circuit reversed the district court's damages calculation. *Id.* at 1011 (1972). The court noted that in cases involving defective products, the United States should receive as damages the difference between the reasonable value of the goods delivered and the price the government actually paid for the goods. *Id.* The *Aerodex* court concluded that the repair costs were consequential damages, and, as such, those costs were not recoverable under the Act:

> [W]e hold that the language of the False Claims Act does not include consequential damages resulting from the delivery of defective goods. The statute assesses double damages attributable to the "act," which in this case is the submission of the false vouchers. The submission of these vouchers was not the cause of the government's consequential damages. The delivery and installation of the bearings in the airplanes, not the filing of the false claim, caused the consequential damages.

Id. at 1011 (1972); *see also Woodbury*, 359 F.2d at 379 (1966) ("In a case of this kind, damages under the False Claim Act must be measured by the amount wrongfully paid to satisfy the false claim."). Thus, the United States in *Aerodex* was entitled to only the contract price doubled, or $54,000, and not the more than $370,000 that was originally awarded the government by the district court. *Id.*

The FCA cases that came after *Aerodex*, but before the 1986 Amendments, "muddied the waters" as to the recoverability of consequential damages.[29] While some of these

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[29] *See* James Dever, *Double Jeopardy, False Claims, and United States v. Halper*, 20 Pub. Cont. L.J. 56, 86 (1990).

decisions adhered closely to *Aerodex* in denying any economic or consequential loss outside of the contract price,[30] other courts have showed a greater willingness to allow the recovery of the various costs incurred by the government beyond the mere value of the contract.[31] Like a number of post-*Aerodex* courts, the Sixth Circuit in *Ekelman & Assocs*, found that *Aerodex* was distinguishable on its facts and also found that its holding "was not inconsistent with" the Fifth Circuit's holding in *Aerodex*. 532 F.2d at 545 (1976).[32]

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[30] *See, e.g., United States v. Miller*, 645 F.2d 473, 475-76 (5th Cir.1981) (holding that the United States cannot recover consequential damages under the Act); *United States v. Hibbs*, 568 F.2d 347, 351-352 (3d Cir.1977) (holding that the United States must show a causal connection between the loss and the fraudulent conduct, and also finding that a broad "but for" test is not consistent with the Act).

[31] se [sic] *See e.g., Toepleman v. United States*, 263 F.2d 697, 700-01 (4th Cir.1959) (holding that the United States is entitled to recover double the loss it suffered "but for the fraud"); *United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir.1966) (holding that the United States may recover "money spent by its employees in straightening out the mess [caused by the false claims] and in protecting its interest thereafter"); *United States v. Ekelman & Assocs., Inc.*, 532 F.2d 545, 550-51 (6th Cir.1976) (holding that the United States can recover not only the payment to discharge insured loans obtained through false claims, but also the reasonable expenses incurred in preserving the properties that served as collateral for the loans).

[32] In *Ekelman & Assocs.*, the government spent money maintaining property after the defendants went into default on a loan obtained through falsified applications. *Id.*, 532 F.2d at 547. These "maintenance costs" (i.e., "incidental expenses") incurred after foreclosure, were included within the government's damage award. *Id.* The Sixth Circuit distinguished *Aerodex*, stating that it was not inconsistent with this decision, indicating a possible effort to distinguish between "incidental or maintenance" damages and "economic or consequential" damages. *Id.*; *see also* Kara Nicole Schmidt, *Privatizing Enviromental Enforcement: The Bounty Incentives of the False Claims Act*, 9 Geo. Int'l Envtl. L.Rev. 663, 678 (1997).

C. *The 1986 Amendments and Consequential Damages* [33]

Initially, Congress indicated that the 1986 Amendments would permit the recovery of consequential damages under the Act. The Senate bill would have amended 31 U.S.C. § 3729(a) to read as follows: "A person is liable to the United States Government for a civil penalty of $10,000, an amount equal to three (3) times the amount of damages, in addition to the amount of consequential damages the Government sustains because of the act of that person . . . ." S.Rep. No. 345, 99th Cong., 2d Sess. 39 (1986). The bill defined consequential damages as those which the United States would not have sustained "but for" the violation of the Act or "having entered into or made any contract or grant as a result of any material part of any false statement." *Id.* at 39-40 (discussing changes to § 3729(b)). The Senate expressly rejected the "narrow and form bound interpretation of the act" found in *Aerodex*. S.Rep. No. 345, 99th Cong., 2d Sess. 19, reprinted in 1986 U.S.Code Cong. & Admin. News 5284. Originally, the House bill also contained language concerning consequential damages. H.R.Rep. No. 660, 99th Cong., 2d Sess. 1-2 (1986). The House bill would have amended § 3729(a) to read as follows: "[Any person who violates the Act] is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, for an amount equal to consequential damages as set forth in subsection (b)(1) plus two (2) times the amount of damages (other than such consequential damages) which the Government sustains because of the act of that person . . . ."

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[33] The following summary of the legislative history of the 1986 Amendments in relation to the issue of consequential damages was compiled in its entirety by a review of the Congressional Record and from relevant portions of the following law review article: James Dever, *Double Jeopardy, False Claims, and United States v. Halper*, 20 Pub. Cont. L.J. 56, 86 (1990).

Id. Subsection (b)(1) defined consequential damages in a manner similar to the Senate bill. *Id.* at 2.

Although both the House and the Senate initially agreed that consequential damages would be recoverable under the Act and that such damages would not be trebled, Senator Grassley offered an amendment on October 3, 1986, deleting any mention of consequential damages. 132 Cong. Rec. S15018-23 (daily ed. Oct. 3, 1986). Senator Grassley explained that House and Senate negotiators had met and reconciled their differences in the House and Senate bills. 132 Cong. Rec. S15515 (daily ed. Oct. 7, 1986) (statement of Sen. Grassley); *cf.* 132 Cong. Rec. H6481 (Sept. 9, 1986) (statement of Rep. Brown) (expressing hope that the Congressional conference would limit consequential damages to those which are reasonably foreseeable and proximately caused by the prohibited acts). As part of that process, forfeitures would be determined by the court "within the range of $5,000 to $10,000, and consequential damages will not be recoverable under the Act." 132 Cong. Rec. S15515 (daily ed. Oct. 7, 1986) (statement of Sen. Grassley). The House agreed to the change, but did not explain why the change was made. *See* 132 Cong. Rec. H9382-83, 9388 (daily ed. Oct. 7, 1986) (statement of Rep. Glickman). Thus, post-1986 Amendments courts are left to analyze arguments concerning causation in order to determine whether damages were sustained "because of the act." 31 U.S.C. § 3729(a) (1988).

Furthermore, the question of consequential damages does not appear to be settled at the present time. After a review of the most recent and relevant case holdings addressing this issue, we find that almost all of these cases are distinguished by the particular facts of the case in question. The holdings range from those that adhere strictly to the *Aerodex* ruling, and those that expand upon the holding of *Aerodex* in their award of additional recovery beyond the value of the item in question. The only consistency in the various cases that

address the issue of the proper measure of recovery under the FCA, is that all of the courts attempt to find a way to "make the government whole."

D. *The Parties's Arguments*

1. *Boeing's and Aerospace's Arguments* [34]

In Defendant's Cross-Motion for Partial Summary Judgment (doc. 340) and Aerospace's Motion in Support of Defendant's Cross-Motion (doc. 402), Defendants seeks summary judgment as a matter of law as to their Fifth Affirmative Defense. The Fifth Affirmative Defense is brought on the grounds that the Government cannot recover damages under the FCA for replacement and repair costs of the destroyed or damaged helicopters, or their contents, which the Government alleges were lost or damaged as a result of the defective component parts (the transmission gears) that were supplied by Speco and Boeing (*Id.*). Defendants assert that the Government's attempt to recover for the loss or damage of the helicopters under a False Claims Act theory of recovery is founded on a "fallacious assumption" for several reasons (*Id.*).

First, Defendants allege that the FCA is not a products liability statute. Defendants also allege that damages under the FCA are those that result from the submission and payment of a false claim and not the damages that flows from any defect in the product for which a claim is made. Furthermore, Defendants assert that it is unaware of any case in which the Government has recovered under the FCA for damage to property or persons that resulted from an underlying product defect.

Second, Defendants contend that the Supreme Court has stated unambiguously that the appropriate measure on which to base damages under the FCA is the difference between the

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[34] For purposes of this section of the Order only, Boeing and Aerospace will be referred to hereinafter, as "Defendants."

value of the claims paid and the value of the goods as delivered. *See Bornstein*, 423 U.S. at 317 n. 13, 96 S.Ct. 523 (1976). With respect to FCA claims involving the delivery of defective products, Defendants submit that, this rule is applied to compensate the Government for an amount reflective of any inferior product delivered to it, and not for the resulting damages caused by a product's defect. *See Aerodex*, 469 F.2d at 1011 (1972) (holding that the FCA does not include consequential damages resulting from the delivery of defective goods).

Third, Defendants allege that even if all of the Government's and Relator's allegations contained in the Amended Complaint (doc. 34) could be proven as true, the helicopter damages would not stem from the submission of a claim, but rather from an alleged failure in the operation of the purportedly defective gears. Thus, according to Defendants, the helicopter damages are not compensable under a FCA theory of recovery (*Id.*).[35] *See Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1371-72 (Fed. Cir.1998) (holding that the government must prove that it sustained an actual loss "as a result of the contractor's false or fraudulent claim").

Fourth, Defendants argue that the proper measure of FCA damages in this case is the difference between the value of

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[35] Defendants assert that the Fifth Circuit in *Aerodex* held that the cost of removal and replacement of the defective product is not compensable under the FCA:

> [T]he language of the False Claims Act does not include consequential damages resulting from the delivery of defective goods. The statute assesses double damages attributable to the "act," which in this case is the submission of the false vouchers. The submission of these vouchers was not the cause of the government's consequential damages. The delivery and installation of the bearings in airplanes, not the filing of the false claim, caused the consequential damages.

Id. at 1011 (1972).

noncompliant gears and the value of the compliant gears. Moreover, Defendants assert that this is the established rule for damages in FCA claims premised on the delivery of defective goods. As set out in *Aerodex*, such damages are to be measured by "the amount wrongfully paid to satisfy the false claim." 469 F.2d at 1011 (1972). Simply put, Defendants maintain that, even if the Government's allegations were proven as true by a trial on the merits, the Government would then be "entitled to a judgment . . . in an amount which reflects only the actually defective or inferior [item] delivered to the Government." *See United States v. Collyer Insulated Wire Co.*, 94 F.Supp. 493, 498 (D.R.I.1950).[36] Thus, Defendants submit that the proper measure of damages in the FCA claim at issue would be to treble the damages for the "diminished value" of any defective, transmission gears; and any additional statutory penalties that are applicable for each purported false claim submitted.

2. *The Government's and Relator's Arguments* [37]

In the Government's Response (doc. 366) and Realtor's Response and Cross-Motion for Summary Judgment (doc. 367), Plaintiffs also seek summary judgment as a matter of law as to the Fifth Affirmative Defense asserted by Defendant. Plaintiffs assert that the United States may recover full replacement and repair costs under the FCA for the helicopters that were destroyed or damaged due to their internal defects. Plaintiffs argue that the proper measure of

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[36] *See also United States ex rel. Compton v. Midwest Specialties*, 142 F.3d at 304 (1998) (finding that the proper measure of damages under the FCA is the difference between the value of goods as delivered and the value of goods as promised); *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47, 62 (8th Cir.1973) ("'[T]he measure of the government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful.'") (quoting *Woodbury*, 359 F.2d at 379 (1966)).

[37] For purposes of this section of the Order only, the Government and Relator will be referred to hereinafter, as "Plaintiffs."

damages in this case according to the Supreme Court and the Sixth Circuit precedents is whatever it takes "to make the Government whole" once liability is established. *See Marcus*, 317 U.S. at 551-52, 63 S.Ct. 379 (1943) ("Damages awarded under the False Claims Act typically are liberally calculated to ensure that they 'afford the government complete indemnity for the injury done it.'"), *accord*, *Bornstein*, 423 U.S. at 314-15, 96 S.Ct. 523 (1976).[38] Plaintiffs also set forth several points in order to counter the arguments presented by Defendants in their Cross-Motion for Partial Summary Judgment (docs. 340 & 402).

First, Plaintiffs counter Defendants arguments by asserting that it is an "irrefutable fact" that the United States did not buy gears from Boeing. Rather, Plaintiffs claim that the United States bought helicopters from Boeing that contained defective gears. Moreover, Plaintiffs allege that *Aerodex* and the issue of consequential damages is not applicable to the facts and issues at bar. Plaintiffs further allege that Boeing submitted claims to the United States which represented that the CH-47(D) helicopters conformed to the contract specifications, when Boeing knew all along that the helicopters did not conform to the contract requirement. Therefore, Plaintiffs reason that, the damage to the helicopters resulting from the failure of the Speco-made gears is direct, and not consequential, damages under the FCA. Plaintiffs assert that nothing in *Aerodex* is contrary to Plaintiffs' damages analysis in this case.

Second, Plaintiffs contend that damages under the FCA are designed to make the United States whole and submit that the Supreme Court has taken an "expansive view" on the issue of

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[38] *See also Compton*, 142 F.3d at 304 (1998) ("While Midwest cites to several cases supporting the practice of deducting the value received by the government from any damage award, even these cases recognize that the government is entitled to full damages where it proves it received no value at all.").

damages that are available under the FCA. *See Marcus*, 317 U.S. at 551-52, 63 S.Ct. 379 (1943) (finding that the chief purpose of the FCA was to provide restitution to make sure the government would be made completely whole); *see also Compton*, 142 F.3d at 304 (1998) ("Damages awarded under the False Claims Act typically are liberally calculated to ensure that they 'afford the government complete indemnity for the injuries done it.'") (quoting *Marcus*, 317 U.S. at 549, 63 S.Ct. 379). Therefore, Plaintiffs argue that, in order for the United States to be made whole in this case, its recovery must include the replacement and repair costs of the destroyed and damaged helicopters. *See Faulk v. United States*, 198 F.2d 169, 173 (5th Cir.1952) (finding that under a FCA theory of recovery, there is flexibility in measuring damages, and, subsequently, affirming the district court's refusal to instruct the jury on the market value of reconstituted milk because the unconsumed milk had no market value to the Army).

Third, although Boeing "knew," within the meaning of the FCA, that the gears did not comply with the contract requirements, Plaintiffs allege that Boeing, nonetheless, submitted claims for the repayment of the helicopters which were represented as being in conformance with the contract specifications, including the specifications concerning the transmission gears. Furthermore, Plaintiffs allege that two of these helicopters failed while in flight due to the non-conformities in the transmission gears, namely cracks in or near the dampening ring groves. Plaintiffs reason that the end result is that the damages to these helicopters are direct, and not consequential. Thus, Plaintiffs argue that damages, such as those described above, which are the natural and proximate cause of an occurrence are not considered "consequential

damages," but rather are deemed "direct damages."[39] *See Grunstein & Sons*, 137 F.Supp. at 210 (1955) (finding that the FCA provides for "damages that naturally and proximately resulted from the fraud").

Fourth, Plaintiffs contend that not only is the replacement cost of the helicopters recoverable under the FCA, but more recent court decisions have also allowed the exact sort of damages that were previously disallowed by the Fifth Circuit in *Aerodex*.[40] *See BMY—Combat*, 44 Fed.Cl. 141, 149-52. Plaintiffs submit that if Defendant is found liable in this action, then it should be required to pay the full replacement, repair, and retrofitting costs of the destroyed and damaged CH-47(D) helicopters.

Finally, Plaintiffs argue that *Aerodex* is simply not consistent with the principle of awarding the United States all of its damages in order to make it completely whole, as required by *Marcus, Bornstein, Ekelman & Assocs.*, *Compton*, and *BMY-Combat*. Moreover, Plaintiffs assert that *Aerodex*'s reasoning is based upon unique facts, because the court determined that a different theory of recovery (breach of warranty) was an alternate means by which the government could recover for its ball bearing-removal damages, without doubling the value of the claim or awarding

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[39] "Direct damages" are defined by *Black's Law Dictionary*, 270-71 (6th ed.1990) as:

> Direct damages are such as follow immediately upon the act done. Damages which arise naturally or ordinarily from a breach of contract; they are damages which in the ordinary course of human experience, can be expected to result from a breach.

Id.

[40] Plaintiffs further contend that even in *Aerodex*, the Fifth Circuit affirmed the award of double the entire contract price for the mislabeled and misnumbered ball bearings because the mislabeled bearings had no value to the United States, which never received what it contracted to receive. *Id.* at 1011 (1972).

consequential damages. *Id.* at 1012 (1972). Plaintiffs reason that *Aerodex* is an example of "rough justice" in which "the court doubled the entire contract price without requiring a relatively small component manufacturer to bear the cost of damages it did not directly control, while still making the government whole" (docs. 366 & 367). Thus, Plaintiffs state that "the wooden application of *Aerodex* which Boeing now advocates is demonstrably inconsistent with both the old and new holdings of the Sixth Circuit" (doc. 367). *See Ekelman & Assocs.*, 532 F.2d at 551 (1976) (affirming the district court's conclusion that the post-foreclosure expenses were recoverable under the FCA).

III. *The Court's Analysis*

There are essentially two issues presented to this Court by the Parties in this matter. The first issue is relatively simple and straight forward: "Are consequential damages recoverable under the False Claims Act?" The second issue is much more complicated, fact dependent, and unsettled: "Assuming Defendant is found liable in this action at a trial on the merits, would the Government's helicopter damages, and the related expenses associated with it, be considered consequential damages or direct damages under the False Claims Act of 1986?"

A. *Consequential Damages*[41] *Are Not Available Under The FCA*

This Court holds as a matter of law that consequential damages are not available, and, thus, are not recoverable under the False Claims Act of 1986. There are several reasons that leads the Court to this conclusion.

First, in the Court's November 2, 1999 Order (doc. 554), we held as a matter of law in this same action that the High-Value Items Clause (hereinafter, "the HVIC") was inapplicable to the False Claims Act because the Act itself was silent as to whether the HVIC provided a contractor-defendant an affirmative defense to violations under the statute. *Roby v. Boeing*, 73 F.Supp.2d 897, 910. In reaching this conclusion the Court explained that:

> [t]he very fact that Congress was willing to amend the terms and provisions of the FCA in 1943 and 1986, while not including the application of the HVIC as a limitation or defense to the statute's penalty provisions, is powerful evidence that Congress never planned for the HVIC's applicability to the FCA.

Id. For exactly the same reason, this Court must also hold that consequential damages are not applicable to the FCA. The record is undisputed that the issue of consequential damages was proposed, debated, and considered by the Congress during the 1986 Amendments to the FCA. However, the Congress, in its ultimate wisdom, decided to exclude the recovery of consequential damages from the final version of

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[41] Black's *Law Dictionary* 270-71 (6th ed.1990) defines "consequential damages" as:

> "[s]uch damage, loss or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such an act;" and as "[d]amages which arise from the intervention of special circumstances not ordinarily predictable."

Id.

the Act.[42] This Court is unwilling to interpret the FCA in the way that the Government and Relator may want in this case. Moreover, the power to amend the statute rests with the Congress and the power to disagree with the holding of *Aerodex* and its progeny rests with the Sixth Circuit. This Court can only highlight that, as of the date of this Order, neither the Congress nor the Sixth Circuit has found consequential damages to be recoverable under the FCA. Furthermore, we cannot substitute our judgment for the will of Congress or the precedents's of this Circuit.

Second, the Supreme Court has explained that the proper measure of damages for false claims are calculated by the differences in the value between what the government contracted for and what the government actually received. *See Bornstein*, 423 U.S. at 317 n. 13, 96 S.Ct. 523 (1976) ("The Government's actual damages are equal to the differ ence between the market value of the tubes it received and retained, and the market value that the tubes would have had if they had been of the specified quality.").

Third, the Government and Relator cite frequently to the case of *BMY-Combat*, in which the court stated it was "likely" to allow recovery for damages such as the costs to inspect and repair the defective brackets installed in the howitzers. *Id.* 44 Fed.Cl. at 147-48. There are two important points that the Government and Relator overlook in their reliance on *BMY-Combat*. The court adopted the holding of *Aerodex* stating that consequential damages are un-

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[42] On the floor of the House, the leading proponent of the 1986 Amendment to the FCA, Rep. Glickman, explained that the bill that emerged from conference "provides for treble damages and deletes consequential damages." 132 Cong. Rec. 29,321 (1986).

available under the FCA,[43] and the court did not grant the government's motion for summary judgment on their theory of damages. *Id.* at 152-53 (1999).

After reviewing the Parties' briefs, exhibits, and evidence and after considering the oral arguments presented at the June 2, 1999 hearing, the Court concludes that there are no genuine issues of material fact that preclude the Court from rendering a judgment as to the merits of Defendant's Cross-Motion for Partial Summary Judgment (doc. 340). Therefore, for the reasons set forth above, this Court finds Defendant's arguments as to the general issue of consequential damages to be well-taken.

B. *Alternate Theories of Recovery Are Available Under the FCA*

This Court having found in favor of Defendant on the issue of consequential damages as not being recoverable under the False Claims Act of 1986, cannot so find that the Government and Relator are unable to recover the replacement and repair value of the destroyed and damaged helicopters, as well as the related costs and expenses associated with it. The damages in this case must be determined by the application of proximate causation [44] and

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[43] The *BMY-Combat* court stated that:

> Courts utilize several methods of damage calculations intended to ensure that the government receives 'the benefit of its bargain,' being careful not to award consequential damages.

Id. at 149 (1999) (citing *Aerodex*, 469 F.2d at 1011 (1972)).

[44] "Proximate cause" is defined in *Black's Law Dictionary*, 852 (6th ed. 1990) as:

> Proximate cause is that which in a natural and continuous sequence, unbroken by any efficient intervening causes, produces injury, and without which the result would not have occurred.

Id.

foreseeability,[45] in an effort to make the Government whole. However, this "begs the question: make whole for what?" The answer to this question is supplied by the Sixth Circuit. "Damages awarded under the False Claims Act typically are calculated to ensure that they 'afford the government complete indemnity for the injury done it.'" *Compton*, 142 F.3d at 304 (1998) (quoting *Marcus*, 317 U.S. at 549, 63 S.Ct. 379 (1943)). In a motion for summary judgment, the Court must assume as true the facts of the non-movant (i.e., Relator) as true. Indeed, Defendant asserts in its Cross-Motion that even if the Government' and Relator's facts are true, they still could not recover any more than the cost of the defective transmission gears in question.[46] This Court finds, assuming Defendant is found liable at a trial on the merits, that genuine issues of material fact preclude the Court from granting summary judgment on the issue of the recovery of the replacement and repair costs of the helicopters in question for several reasons.

First, *Bornstein* in no way purports to establish a "fixed rule of damages."[47] The Supreme Court reaffirmed in *Bornstein* what it had earlier held in *Marcus*—that "the device of double damages plus a specific sum [as a civil penalty] was

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[45] "Foreseeability" is defined in *Black's law Dictionary*, 449 (6th ed. 1990) as:

> Foreseeability is that which is objectively reasonable to expect, not merely what might conceivably occur.

Id.

[46] The transmission gears in question had a estimated value in 1993 to be approximately $5,000 in 1991 (*see* docs. 366 & 367). The CH-47(D) helicopter have an estimated replacement value of approximately 12 million.

[47] *Bornstein* was concerned only with the issue of damages and penalties against a subcontractor who causes the prime contractor to submit false claims. 423 U.S. at 306, 96 S.Ct. 523 (1976). The prime contractor in that case had already settled with the government. *Id.*

chosen to make sure that the government would be made completely whole." *Id.* 423 U.S. at 314, 96 S.Ct. 523 (1976) (quoting *Marcus*, 317 U.S. at 551-52, 63 S.Ct. 379 (1943)). Indeed, other courts have recognized that *Bornstein* did not purport to lay down an immutable rule of damages. *See BMY-Combat*, 44 Fed.Cl. at 147 ("Because each case under the FCA involves unique types of damage to the government, a formula for calculating damages must be created for each case that will provide the government with its damages directly caused by the filing of a false claim.").[48] Defendant has not cited to a single FCA case in which products were destroyed as a result of a latent defect in a bad part, and, subsequently, the government's damages were calculated on the basis of the value of only the part. In fact, after a thorough review of the case law in this area, this Court has not found any case which is on point with the facts and issues of the case at bar. Therefore, cases such as *Bornstein* and *Aerodex*[49] can serve only as a guide, but does not establish a "one-size-fits-all" damages interpretation.[50]

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[48] The Eleventh Circuit explained in *United States v. Killough*, 848 F.2d 1523, 1532 (11th Cir.1988) that:

> [n]o single rule can be, or should be, stated for the determination of damages under the Act . . . Fraudulent interference with the government's activities damages the government in numerous ways that vary from case to case. Accordingly, the [Congressional Committee] believes that the courts should remain free to fashion the measure of damages on a case by case basis.

Id. (quoting S.Rep. No. 615, 96th Cong.2d Sess. at 4 (1986)).

[49] The case at bar is also distinguishable from *Aerodex* in several ways including: (1) *Aerodex* involved a manufacturer of component parts, while Boeing is a manufacturer of helicopters; (2) *Aerodex* involved delivery of individual components for later installation into airplanes, while Relator alleges that Boeing led the United States to believe that the helicopters that were delivered, "required nothing more than a pre-flight check and a Chinook pilot's expertise" (doc. 367). Note: The Court recognizes that

Second, Defendant asserts that the proper measure of damages in this case is the difference between the value of the helicopter with a good gear and the value of the same helicopter with a bad gear. We find that Defendant's proposed measure of damages may fail in light of the Government's and Relator's claims. The Government and Realtor aver that the value of the helicopter as delivered was less than nothing: "Boeing's false certification of compliance rendered the helicopter not only non-air worthy, but a hazard to the soldiers whose orders required them to occupy it in flight" (doc. 432). *See Compton*, 142 F.3d at 304 (1998) (finding that the value of the product delivered to the government was zero, the court awarded the government the full contract price).[51] For example, if indeed the Government

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Relator's allegations are but one of the many factual disputes that exist between the Parties to this litigation.

[50] The Supreme Court in *Bornstein* addressed the very issue of a "one-size-fits-all" approach to assessing damages under the FCA:

> To equate the number of forfeitures with the number of contracts would in a case such as this result in almost always in a single forfeiture, no matter how many fraudulent acts the subcontractor might have committed. This result would not only be at odds with the statutory language; it would also defeat the statutory purpose. Such a limitation would in the language of the Government's brief, convert the Act's forfeiture provision into little more than a $2,000 license for subcontractor fraud.

Bornstein, 423 U.S. at 311, 96 S.Ct. 523 (1976).

[51] Defendant contends that "the Government cannot realistically assert that the helicopters as delivered to the Army possessed no value" (doc. 401). However, Relator replies that:

> [h]ere, the "value" of Helicopter 89-0165 was, at the time of delivery, less than "zero" because the Government not only had to buy a new helicopter to replace the one which burned in Saudi Arabia and had to rebuild the one which crashed at Fort Meade, but also has had to spend millions on investigation and litigation expenses. Thus, to the extent Defendant relies upon the proposition

and Relator are able to prove at trial that the helicopter as delivered by Defendant was valued at zero due to the defective gears, Defendant may be liable for the replacement and repair costs of the helicopters.[52]

Third, as earlier noted, other courts have found that direct, incidental, and maintenance damages are recoverable under the FCA. If the Government and Relator are able to prove at trial that the damage to the CH-47(D) helicopters was as a direct, proximate, and foreseeable result of the false representations made by Boeing to the United States that the helicopters conformed to the contract requirements, those damages may then be found to be recoverable.[53] Moreover, assuming for a moment that the Government and Relator are able to prove their allegations of fact and direct damages to be true, then the issue of consequential damages and its application would not only be inapplicable to the case at bar, but would also no longer act as a bar to "making the government whole."[54]

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that the helicopter, falsely certified as compliant, had "value" when delivered, it is simply mistaken.

(doc. 432).

[52] As the Sixth Circuit stated in *Ekelman*, 532 F.2d at 550 (1976), recoverable damages are those which "naturally and proximately flow from the 'act' of filing a fraudulent claim under the Act." Furthermore, in *Hibbs*, 568 F.2d at 351 (1977), the Third Circuit held that the statute "compels consideration of the element of causation," which is to be "liberally construed so as to provide the government restitution from those whose fraud has caused loss" by considering "the relationship between the unlawful act and the injury ultimately sustained."

[53] *See Ben Grunstein & Sons*, 137 F.Supp. at 210 (1955) (finding that the FCA authorizes damages that are the natural and proximate result of the fraud at issue).

[54] As the Sixth Circuit explained in *Mead Corp. v. McNally-Pittsburg Mfg. Corp.*, 654 F.2d 1197, 1209 n. 17 (6th Cir.1981): "[C]onsequential damages" are those "resulting in the ordinary course of events from the seller's breach". The *Mead* court also recognized that the element of

Fourth, the FCA provides that the United States may recover those damages "which the Government sustains because of the act of" the defendant. 31 U.S.C. § 3729(a) (1999). Of course, this Court recognizes that no physical damage is ever physically and immediately "caused" by the mere "act" of filing a piece of paper. Rather, damage is caused by what that piece of paper causes. So the issue in this case boils down to one of causation, specifically, proximate causation. It is undisputed by either Party and by the relevant case law that the direct causation of damages is recoverable under the Act. Until the Government and Relator are given an opportunity to present their evidence at trial, this Court is unwilling to conclude as a matter of law that they are unable to prove their claims. Defendant moves this Court to summarily adjudicate the exact measure of damages by concluding that at most, Boeing is liable for the price of a fully-conforming transmission gear, as opposed to the replacement and repair value of multi-million dollar helicopters and their related contents that were actually destroyed or damaged in Saudi Arabia and Ft. Meade., Md. Moreover, Defendant ask this Court to conclude on a motion for summary judgment that the Government should not be allowed to present evidence at trial that may indeed prove that the damages at issue in this matter are the direct, proximate, and foreseeable result of the claims submitted by Defendant. This Court finds Defendant's Cross-Motion as to this issue to be premature and inappropriate at this time.

Fifth, in his Reply, Relator confronts Defendant with an interesting rhetorical question: "The question which Boeing did not answer is how is it possible to make the United States whole for the complete loss in Saudi Arabia of

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"proximity" is "inherent in consequential damages." *Id.* The court concluded that Mead's increased labor costs in completing work left undone was not consequential damage, and that such amounts were therefore recoverable by McNally as direct losses. *Id.* at 1209.

Helicopter 89-0165 and all that was aboard it, and the damage to Helicopter 86-1671 at Fort Meade, by paying three times the price of the broken transmission gears" (doc. 432). This Court finds that genuine issues of material fact prevent this Court from answering Relator's question at this time. The question set forth above is precisely why we find that summary judgment is premature and inappropriate as to this issue at this time, and that a trial on the merits is necessary in order to decide which of the Government's and Relator's alleged damages are consequential, and which are direct.

Furthermore, the Court finds that to prematurely preclude the Government and Relator from having an opportunity to prove its alleged damages at a trial on the merits, would not be in the fundamental interest of fairness and justice. We believe that the Government and Relator should be given an opportunity to prove their case on the issue of merit and damages in this matter. If this Court determines at trial that the only damages presented by the Government and Relator are of a consequential nature, then those damages would not be available to the Government and Relator under a FCA theory. However, if the Government and Relator present sufficient evidence that the damages sought are of a direct, proximate, and foreseeable nature, then those damages may be available to the Government and Relator under a FCA theory of recovery. *See Long Island Lighting Co. v. Transamerica Delaval, Inc.*, 646 F.Supp. 1442, 1459 n. 30 (S.D.N.Y.1986) ("We reserve for trial the question of whether the plaintiff's claimed damages should be characterized as direct, incidental, or consequential."); *see also American Elec. Power Co. v. Westinghouse Elec. Corp.*, 418 F.Supp. 435, 459 (S.D.N.Y.1976) ("In general, the precise demarcation between direct and consequential damages is a question of fact").

C. *The Court's Summary*

In conclusion, this Court finds that consequential damages are not recoverable under the False Claims Act. However, we do find that in the Sixth Circuit, direct and incidental damages are recoverable under the False Claims Act. It remains a question of fact to be decided at trial whether the Government's and Relator's allegations and theories of injuries, damages, and recovery are consequential, direct, or incidental in nature. This Court also finds that it would be inappropriate, premature, and against the interest of fairness and justice to decide this issue on a motion for summary judgment. Thus, this Court finds neither Parties' Cross-Motion for Summary Judgment to be persuasive on the issue of the Government's and Relator's actual measure of damages in this matter.

Accordingly, we hereby hold as a matter of law that Defendant's Cross-Motion for Partial Summary Judgment as to the Measure of Damages is hereby GRANTED IN PART for the reasons noted by the Court in Section IV of this Order. In addition, for the reasons set forth above Relator's Cross-Motion for Summary Judgment as to the Measure of Damages (doc. 367) is hereby DENIED.

Furthermore, having reviewed this matter, the Court finds that genuine issues of material fact preclude this Court from finding as a matter of law that the Government is not entitled to the replacement and repair value, as well as the associated costs of the destroyed and damaged helicopters. Therefore, for the reasons set forth above, Defendant's Cross-Motion for Partial Summary Judgment (doc. 340) is not well-taken in regards to this issue, and is therefore DENIED. In addition, for the same reasons set forth above, Relator's Cross-Motion for Summary Judgment (doc. 367) is also DENIED.

CONCLUSION

For the foregoing reasons, Defendant's Cross-Motion for Partial Summary Judgment as to the Measure of Damages (doc. 340) is GRANTED IN PART in relation to the general issue of consequential damages, and DENIED in relation to the issue of preclusion of the Government's replacement and repair helicopter costs. Furthermore, Relator's Cross-Motion for Summary Judgment (doc. 367) as to the Measure of Damages is DENIED.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
S.D. OHIO
WESTERN DIVISION

No. C-1-95-375

UNITED STATES OF AMERICA ex rel. BRETT ROBY,
Plaintiff,

v.

THE BOEING COMPANY,
Defendant.

Filed Nov. 2, 1999

ORDER

SPIEGEL, Senior District Judge.

This matter is before the Court on the Government's Motion for Partial Summary Judgment as to Defendant's Third Affirmative Defense Re: The High Value Items Clause (hereinafter, "the Government's Motion for Partial Summary Judgment") (doc. 296); Defendant's Memorandum in Opposition to the Government's Motion for Partial Summary Judgment (hereinafter, "Defendant's Response") (doc. 340); Government's and Relator's Joint Reply in Support of its Motion for Partial Summary Judgment (hereinafter, "Plaintiffs' Joint Reply") (doc. 366); Aerospace Industries of America, Inc.'s Motion for Leave to Participate as *Amicus Curiae* (hereinafter, "Aerospace's *Amicus Curiae* Motion") (doc. 402); Government's Opposition to Aerospace's *Amicus Curiae* Motion (doc. 417); Relator's Opposition to Aerospace's *Amicus Curiae* Motion (doc. 422); Aerospace's Reply to the

Government's and Relator's Opposition Memoranda (doc. 428); and Defendant's Reply to the Government's and Relator's Opposition Memoranda (doc. 429).

BACKGROUND

On May 22, 1995, Relator Brett Roby (hereinafter, "Relator") filed this action under seal pursuant to Title 31 U.S.C. § 3730(b) on behalf of himself and the United States Government (hereinafter, "the Government") in the United States District Court for the Southern District of Ohio (doc. 2). Relator alleges that The Boeing Company (hereinafter, "Boeing" or "Defendant") and its supplier, The Speco Corporation (hereinafter, "Speco"),[1] violated the False Claims Act, Title 31 U.S.C. § 3729 *et seq.*, by manufacturing and selling defective transmission gears to the Government via Boeing's CH-47(D) Chinook Army helicopters (hereinafter, "CH-47-(D) helicopters") (*Id.*). On April 30, 1997, the Government intervened and filed an Amended Complaint (doc. 34) against Boeing. In the Amended Complaint, the Government alleges that Speco manufactured defective gears at its Springfield, Ohio facility before Boeing installed the gears in the CH-47(D) helicopters and provided them to the United States Army (*Id.*). The Amended Complaint was unsealed on May 1, 1997.

Government and Relator allege in Count I of the Amended Complaint that Defendant submitted false claims under Title 31 U.S.C. § 3729-3133, as amended by Pub.L. 99-562, 100 Stat. 3153 (1986) (doc. 34). Specifically, the Government contends that one of the Speco-made gears failed in 1991, leading to the total loss of a CH-47(D) helicopter and all of its contents, at an estimated loss of approximately $10 Million (*Id.*). In addition, the Government alleges that in 1993 a

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[1] Although an original party to this action, Speco filed for bankruptcy and later settled this action with the United States and Relator in the United States Bankruptcy Court.

Speco-made gear failed in another helicopter resulting in a hard landing near Ft. Meade, Maryland, causing approximately $1 million in damage to the helicopter (*Id.*). The Government contends that "[b]y virtue of the acts described above, Boeing, by and through its officers, agents, and employees, knowingly submitted, and caused to be submitted, false or fraudulent claims for payment or approval to [its] officers, employees, or agents of the United States Government" (*Id.*). The Government concludes Count I with the contention that "[b]y reason of these payments made upon these false claims, the United States Government has been damaged as a result of Defendant's violations of the False Claims Act, arising under [Title] 31 U.S.C. §§ 3729(a)(1), (2), (3) & (7), for damages to be determined at trial . . ." (*Id.*).

The Amended Complaint further asserts claims against Defendant for: (1) payment by mistake, (2) unjust enrichment, (3) breach of contract, and (4) common law fraud (Id.). The Government seeks to recover treble damages based on the value of the first CH-47(D) helicopter and its contents, for the cost of repairing the second aircraft, and to treble those damages under the False Claims Act (*Id.*). In addition, the Government asserts that it is entitled to treble damages for the delivery of other U.S. Army Chinook helicopters that Speco allegedly manufactured with non-conforming engine transmission gears from 1987 to 1995, and statutory penalties of $5,0000 to $10,000 for the submission of each purportedly false claim for the helicopters in question (*Id.*).

In its Answer, Defendant submits a general denial of the Government's allegations of false claims, violations of the False Claims Act, and the resulting compensatory and statutory damages (doc. 161). Defendant defends by asserting a total of twelve (12) affirmative defenses that would individually or collectively relieve Defendant of all liability from

the Government's claims (*Id.*).[2] Specifically, Defendant's Third Affirmative Defense states that the "damages sought by the [G]overnment are barred by its inclusion of the High Value Items Clause in the prime contract with Boeing" (*Id.*).

On December 12, 1998, the Government filed a Motion for Partial Summary Judgment (doc. 296) challenging Defendant's assertion of the High-Value Items Clause as an affirmative defense. Thereafter, Defendant filed a Response (doc. 340) and Government and Relator followed with a Joint Reply (doc. 366). This Court heard oral arguments on the Government's Motion on June 2, 1999 (doc. 441). On May 7, 1999, Aerospace Industries Association of America, Inc filed its Motion for Leave to Participate as *Amicus Curiae* (doc. 402). Shortly thereafter, the Government and Relator filed separate Motions in Opposition Memoranda (docs. 417 & 422); and followed by Aerospace's and Defendant's Reply briefs (docs. 429 & 429).

The Court believes it is important to note that, even though the Parties included discussions on the issues of the appropriateness and measure of consequential damages in their respective pleadings, this Order will only address the primary issue of the applicability of Defendant's Third Affirmative Defense in regards to the False Claims Act. Furthermore, any issues concerning the merits of the Government's and Relator's claims, or of Defendant's eleven (11) other affirmative defenses will not be addressed by the Court in this Order.

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[2] Boeing alleges the following affirmative defenses to the allegations set forth in the Amended Complaint: (1) failure to state a claim upon which relief can be granted; (2) the fraud cause of action is time-barred; (3) the damages sought are barred by the High-Value Items Clause; (4) estoppel due to the High-Value Items Clause; (5) consequential damages are not available; (6) no injury; (7) failure to plead fraud with particularity; (8) laches; (9) express contract; (10) special damages are not plead with specificity; (11) punitive damages are not plead with particularity; and (12) equitable estoppel (doc. 161).

STANDARD OF REVIEW

The narrow question that we must decide on a motion for summary judgment is whether there exists a "genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The Supreme Court elaborated upon the appropriate standard in deciding a motion for summary judgment as follows:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case. Id. at 321, 106 S.Ct. 2548; *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 405 (6th Cir.1992); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989). If the moving party meets this burden, then the non-moving party "must set forth specific facts showing there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see Guarino*, 980 F.2d at 405.

As the Supreme Court stated in *Celotex*, the non-moving party must "designate" specific facts showing there is a genuine issue for trial. *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548; *Guarino*, 980 F.2d at 405. Although the burden might not require the non-moving party to "designate" facts by citing page numbers, "'the designated portions must be presented with enough specificity that the district court can readily identify the facts upon which the non-moving party

relies.'" *Guarino*, 980 F.2d at 405 (quoting *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir.1989), *cert. denied*, 494 U.S. 1091, 110 S.Ct. 1839, 108 L.Ed.2d 967 (1990)).

Summary judgment is not appropriate if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Conclusory allegations, however, are not sufficient to defeat a motion for summary judgment. *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir.1990).

DISCUSSION

I. *Aerospace's Amicus Curiae Motion*

In relation to Aerospace's *Amicus Curiae* Motion (doc. 402), we note that Local Rule 7.2 sets forth the guidelines for the submission of memoranda filed with this Court. Aerospace asserts in its Motion that "a district court has discretion to grant *amicus curiae* status to a party for the purpose of providing such party the opportunity to present views on the issues before the Court, when such party has an important interest and a valuable perspective on the issues presented in this case" (*Id.*). *See, e.g., Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir.1997); *United States v. State of Michigan*, 940 F.2d 143, 146 (6th Cir.1991); *United States v. State of Michigan*, 680 F.Supp. 928, 943 (W.D.Mich.1987).

In the Government's and Relator's Opposition to Aerospace's *Amicus Curiae* Motion (docs. 417 & 422), they allege that Aerospace's Motion is untimely, improper, and not useful to this Court in deciding this matter. *See United States v. Michigan*, 940 F.2d at 165 ("[P]articipation as an *amicus* to brief and argue as a friend of the court was, and continues to be, a privilege within the sound discretion of the court"). Moreover, the Government and Relator assert that Aerospace

and Defendant are attempting to file a *sur reply* disguised as an *amicus curiae* brief in violation of the Local Rule's "good cause" requirement. *See* S.D. Ohio Civ. R. 7.2(a)(2).

In contrast, Aerospace's Reply contends that its Motion for *Amicus* was "filed at an appropriate time during the proceedings, while the parties were in the midst of briefing cross motions for partial summary judgment, and was therefore timely" (doc. 428). *See Fluor Corp. v. United States*, 35 Fed. Cl. 284, 286 (1996) (finding that the filing of an *amicus* brief in the midst of cross motions for summary judgment was timely). Furthermore, Aerospace contends that its "*amicus* brief brings to the Court's attention considerations that are germane to the Court's decision[;] [Aerospace's] brief is helpful and necessary to the Court's resolution of the issues presented in this case" (*Id.*). *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir.1997) (holding that an *amicus* brief should be allowed when the *amicus* has unique information or perspective that can help the court beyond that the lawyers or the parties are able to provide).

After reviewing this matter, this Court finds that Aerospace has an important interest and a valuable perspective that is helpful to the Court on the issues presented in this case. In addition, we find Aerospace's *Amicus Curiae* Motion to be in compliance with the guidelines set forth in Local Rule 7.2(a)(1) for the submission of memoranda filed with this Court, and, thus, no further showing of "good cause" is required of Aerospace. *See* S.D. Ohio Civ. R. 7.2(a)(2).

Accordingly, pursuant to Local Rule 7.2, the Court finds Aerospace's Motion to be well-taken, and, thus, we hereby GRANT Aerospace's Motion for an Appearance as *Amicus Curiae* (doc. 402) in this action.

II. *The Parties Arguments*

In the Government's Motion for Partial Summary Judgment (doc. 296), the Government seeks summary judgment as a matter of law as to the Third Affirmative Defense asserted by Defendant. The Third Affirmative Defense is brought on the grounds that the High-Value Items Clause [3] (hereinafter, the "HVIC"), set forth in Title 48 of the Code of Federal Regulations ("C.F.R."), § 46.800 *et seq.* (1999), and incorporated into the contracts between the Government and Boeing, allegedly provides no defense to the Government's claims against Defendant for violations of the False Claims Act (hereinafter, the "FCA") or common-law doctrines, such as fraud and unjust enrichment.[4] The Government asserts that it is not arguing that the HVIC is void and without effect. Rather, the Government argues, "its legal effect may be to limit Boeing's liability to lessen damages in a breach of contract action for any loss, destruction, or damage to the [G]overnment's property in situations where there is no proof of 'willful misconduct' or 'lack of good faith' by Boeing's 'managerial personnel'" (*Id.*). *See* 48 C.F.R. § 46.803(d)(2) (1999). Nonetheless, the Government reasserts that the HVIC

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[3] *See* Title 48 C.F.R. § 52.246-24 (1999) "Limitation of Liability—High-Value Items."

[4] Moreover, the Government contends in its Motion that while the HVIC may be applicable to its breach of contract claim against Defendant, it also believes there may be sufficient evidence of a "'lack of good faith' by Boeing's managerial personnel" in order for Boeing to attempt to bring this case within an exception to the HVIC. *See* 48 C.F.R. § 46.803(d)(2) (1999). Nonetheless, the Government submits that whether there exists such evidence is irrelevant to this Motion. Additionally, the Government alleges that it has reason to believe that Defendant has insurance coverage which renders the HVIC *per se* inapplicable. *See* 48 C.F.R. § 46.803 (d)(3) (1999).

Note: The issue of whether or not Boeing is actually insured for this loss will not be addressed in this Order.

cannot be construed to preclude liability, limit damages, or be permitted to "engraft additional elements or requirements on to an Act of Congress, such as the FCA" (*Id.*).

In its Response, Defendant alleges that, pursuant to the HVIC, the Government agreed to hold Boeing harmless for the loss or damage to high-value government property, including any defects or deficiencies that may have been present in the CH-47(D) helicopters that Boeing delivered under the primary military contract (doc. 340). The HVIC, Defendant submits, bars the Government from seeking compensation for any loss or damage to the two helicopters under any of the claims asserted. Defendant sets forth several points as to why its Third Affirmative Defense should act as a bar to the Government's and Relator's FCA, fraud, and common law claims.

First, Defendant asserts that, as required by the Federal Acquisition Regulations (hereinafter, "F.A.R."),[5] the HVIC [6] is included in every military procurement contract for high-value items at the behest of, and for the benefit of, the Government. *See* 48 C.F.R. § 46.805(a)(2) (1999). Were it not for this Clause, Defendant contends that contractors (such as Boeing) would be forced to purchase extremely expensive liability insurance, the cost of which would be borne by the Government pursuant to established contract cost principles. *See* 48 C.F.R. § 31.205-19 (1999). Defendant writes "[t]herefore, in order to reduce significantly the cost of major defense systems and equipment, the Armed Services have a long-standing practice—in existence since World War II and

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[5] The Federal Acquisition Regulations are codified in Title 48 of the Code Of Federal Regulations ("C.F.R.") and are usually found under the same or similar section numbers.

[6] *See* 48 C.F.R. § 52.246-24 (1999).

formally embodied in the FAR or its precursor since 1971—of self-insuring for damages to high-value items such as military aircraft" [7] (doc. 340).

Second, Defendant alleges that, on its face, the HVIC prohibits recovery for the claimed damages. Defendant further contends that the warranty clauses in the procurement contract limits its liability for defective components to the cost of "repair or replacement of the warranted primary or secondary component which originally failed" (doc. 340, Exs. 3 & 4). In particular, Defendant quotes the pertinent terms of the contract that allegedly bolsters its assertions that the HVIC bars the Government's claims. Defendant submits that the military procurement contract states, in pertinent part, that:

> [R]esultant damage from the failure [of a warranted part] does not include damage to Contractor-warranted components/parts which result from hard landing, crash impact, fire and/or explosion, although the cause of such occurrences may be traced in whole or in part to failure of a warranted component/part.

(doc. 240, Exs. 4 & 5).

Third, Defendant further submits in its Response that the HVIC was intended to preclude claims for damage to high-value items, regardless of the Government's cause of action or theory of recovery. *See Australia v. Lockheed Aircraft Corp. & Menasco Mfg. Co.*, Civ. No. 69-1623-WPG (C.D.Cal. Jan. 10, 1972)[8] (hereinafter, "*Menasco*") (doc. 340,

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[7] "'High-value item' means a contract end item that (a) has a high unit cost (normally exceeding $100,000 per unit), such as an aircraft, an aircraft engine, a communications system, a computer system, a missile, or a ship, and (b) is designated by the contracting officer as a high-value item." 48 C.F.R. § 46.802 (1999).

[8] Based on the record before it, the district court in *Menasco* found that it was:

> [T]he practice of the United States Navy not to make damage claims against the manufacturers of military aircraft that it purchased for its

Ex. 5); *see also* 4 United States Commission On Government Procurement, *Report of the Commission on Government Procurement* 87, 91-93 (1972) (hereinafter, "*Comm'n Report*") (doc. 340, Ex. 6).[9] Thus, Defendant asserts that the reference to "contractual relief" in 48 C.F.R. § 46.803(c) is not simply relief from contractual claims (i.e., breach of contract), but is also relief from the damages arising out of the purchase or use of the goods delivered. *See In re Gulf & Midlands Barge Line, Inc.*, 509 F.2d 713, 719 (5th Cir.1975) (finding that the phrase "any peril" in the insurance policy of the National Aeronautics & Space Administration also included acts of negligence by the tug boat's crew).

Defendant also argues in its Response that precedent establishes that the "assumption-of-risk" clauses found in the procurement contracts may circumscribe the availability of damages under the FCA and other causes of action. Defendant submits that the case of *United States v. United States Cartridge Co.*, 198 F.2d 456 (8th Cir.1952), is directly on point with what the law and holding should be in this matter.

> own use, in the event of the loss of such aircraft. This practice was followed irrespective of any conclusion that the Navy might hold with respect to such matters as negligence or breach of warranty on the part of the manufacturer.

Id. at 2; *see also* doc. 340, Ex. 5.

[9] The Commission on Government Procurement similarly reported that prior to *Menasco*, defense contractors "universally" understood that the general practice of the government in military contracting was to accept risk for loss or damage except for the warranted item that was defective. The Report went on to state that:

> The history of the government's pursuit of claims for lost or damaged property supports the industry understanding of the unwritten policy of self-insurance. Except for nominal repairs and replacements, there is little precedent in the courts, boards of contract appeals, or the General Accounting Office on claims against contractors . . . for recovery of such damages.

Comm'n Report, at 92; *see also* doc. 340, Ex. 6.

In *United States Cartridge*, the court barred the government from bringing a FCA action because the government had agreed to limit the contractor's liability for damages, including those arising from fraud. *Id.* at 465. According to Defendant, the Eighth Circuit found that the Secretary of War had the statutory authority to enter into contracts in order to "allocate the risks and obligations which were to be assumed by the [contractor] and those which were to be borne by the government; [and] was authorized to limit the defendant's risks in that regard to whatever extent he deemed necessary in order to secure [the contractor's services]." *Id.* Defendant submits that, even if the Court finds that the High-Value Items Clause and the FCA are in conflict with each other, then the Government is nonetheless bound by its prior promises under the HVIC.

The Government and Relator (hereinafter, "Plaintiffs") submitted a Joint Reply (doc. 366) in support of the Plaintiffs' Motion for Partial Summary Judgment (doc. 296). Plaintiffs assert that the HVIC does not and cannot in any way limit the damages available under the FCA or modify the definition of "knowing" as set forth in the FCA (doc. 366). Plaintiffs also set forth several points in order to dispute the arguments presented by Defendant in its Response.

First, Plaintiffs contend that the HVIC is itself silent as to the FCA and common-law fraud claims, and the F.A.R. limits its application to "contractual remedies." *See* 48 C.F.R. §§ 46.803 & 52.246-24 (1999). Plaintiffs further assert that the complete silence in the HVIC, coupled with 48 C.F.R. § 46.803, demonstrates that the Department of Defense (hereinafter, the "DOD") intended that the HVIC be limited to contractual claims only. Plaintiffs distinguish the *Menasco* case from the instant matter by noting that, in *Menasco*, there was no evidence that the government of Australia ever advanced any claims relating to a FCA violation or common law fraud against either the prime contractor or the

subcontractor that manufactured the failed landing gear. Instead, Plaintiffs insist that *Menasco* focused on products liability and negligence claims. *See Menasco*, Civ. No. 69-1623-WPG, at 2.

Second, Plaintiffs aver that liability and damages under the FCA does not arise from the defective nature of the products supplied but from a defendant's false statements and false claims concerning those products. *See United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 301-02 (6th Cir.1998) (finding that liability under the FCA arose from false representations of a party that brake-shoe kits conformed to the terms of the contract). Moreover, Plaintiffs submit that when 48 C.F.R. §§ 46.803(a)-(d) are read together, it is clear that the Government does not act as a self-insurer as to contractual liability for the loss or damage to high-value items when the defects are the result of "willful misconduct" or a "lack of good faith" on the part of the contractor's management personnel (doc. 366). Those same public policy arguments should also apply to protect the Government from the fraudulent claims of contractors as well.

Third, Plaintiffs contend that to read the HVIC as Defendant suggests would improperly allow a regulation to supersede or modify a statute. *See, e.g., Robbins v. Bentsen*, 41 F.3d 1195, 1198 (7th Cir.1994) ("Regulations cannot trump the plain language of the statutes, and we will not read the two to conflict where such a reading is unnecessary.").[10]

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[10] *See also Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 858-59 (Fed.Cir.1997) ("Generally, a provision in a government contract that violates or conflicts with a federal statute is invalid or void.") (quoting *American Airlines, Inc. v. Austin*, 75 F.3d 1535, 1538 (Fed.Cir.1996)); *Urban Data Sys., Inc. v. United States*, 699 F.2d 1147, 1151 (Fed.Cir.1983) (holding that price adjustment clauses that violate a federal statute are invalid or void); *Yosemite Park v. United States*, 217

Plaintiffs argue that "[t]o adopt Defendant's argument would require the DOD to do by contract that which it cannot do under statute—resolve FCA and fraud claims" (doc. 366).

Moreover, Plaintiffs allege that Defendant's attempt to characterize *United States Cartridge* as a case that is on point with the issues at bar is inaccurate and "misleading" (doc. 366). Plaintiffs submit that *United States Cartridge* should be viewed as a case decided under a long-superseded version of the War Powers Act that had as its underlying theme the exigencies of the then-imminent World War II (*Id.*). *See United States Cartridge*, 198 F.2d at 463.[11] Plaintiffs conclude this point by stating that:

> Thus, despite Boeing's claims that *United States Cartridge* is directly on point with the instant case, it is clear that in the remanufactured contracts, which were not issued under the War Powers Act, not the product of a 'state of emergency,' and not subject to the unique manufacturing and labor issues of pre-World War II. [T]he contracting officer had no authority to waive or limit the United States claims against Boeing for its own fraud and violations of the FCA.

(doc. 366). Thus, Plaintiffs argue, there are no genuine issues of material fact that prevent this Court from finding in favor of the Government as a matter of law.

Ct.Cl. 360, 582 F.2d 552, 558 (1978) (finding that a provision in the contract that violated a federal procurement law was an unenforceable portion of that contract).

[11] Plaintiffs further distinguish *United States Cartridge* by asserting that to compare the emergency situations during the World War II era with the limited monitoring accomplished by Government inspectors would also be "misleading." "The inclusion of an inspection clause in a contract does not modify the prime contractor's responsibility to supervise its subcontractors and does not make the Government the *de facto* manager of the facility," as was the case in *United States Cartridge* (doc. 366).

Nonetheless, in its *Amicus Curiae* Motion, Aerospace asserts that the High-Value Items Clause provides that the Government will self-insure for the loss caused by any damage to high-value items regardless of how the Government's damages are characterized (doc. 402). Moreover, Aerospace alleges that it, and its member companies, have conducted business with the Government in reliance on this common understanding of the HVIC (*Id.*). Aerospace contends that it has detrimentally relied on the HVIC, and, therefore, "[a]ny inconsistency between the policy language set forth in F.A.R. Part 46 and the High-Value Items Clause must be resolved in favor of the contract provision, which limits the Government's ability to recover for the loss of high-value items under the False Claims Act" (*Id.*). Furthermore, Aerospace argues that "[t]he Government's assertion that it can simply abrogate the contractual protections it has conferred upon its contractors by invoking a statute like the FCA and contending that the statute 'trumps' a valid and enforceable contract provision is equally unsupportable" (*Id.*).

After reviewing the Parties' briefs, exhibits, and evidence and after considering the oral arguments presented at the June 2, 1999 hearing, the Court concludes that there are no genuine issues of material fact that preclude a grant of summary judgment as to the Government's Motion for Partial Summary Judgment. Therefore, for the following reasons, this Court finds the Government's and Relator's arguments to be persuasive and well-taken. Accordingly, we hereby hold as a matter of law that Defendant Boeing's Third Affirmative Defense that was being asserted against the FCA claims brought by the Government and Relator is hereby DISMISSED for the reasons noted by the Court in Section V of this Order.

III. *The False Claims Act*

A. *The "Qui Tam" Provisions of the FCA* [12]

The FCA, which Congress originally enacted in 1863, is the "government's primary litigative tool for combating fraud" against the federal government. S.Rep. No. 99-345, at 2 (1986). The Act authorizes both the Attorney General and private persons to bring civil actions to enforce the Act. Title 31 U.S.C. § 3730. Congress amended the FCA in 1986 to increase the financial and other incentives for private individuals to bring suits under the Act in the hopes of enlisting the aid of the citizenry in combating the rising problem of "sophisticated and widespread fraud." S.Rep. No. 99-345, at 2, 23-24 (1986).

Section 3730(b) of the FCA as now constituted provides that a person may bring a civil action for a violation of the substantive provisions of the Act "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). The action must be brought in the name of the government. An action under this provision is termed a "*qui tam*" [13] suit, and the person who brings such an action is referred to as a "relator" or "informer." *Id.* If the government files an action to enforce the FCA, a would-be relator may not later bring an

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[12] The following summary of the history of the FCA was compiled in its entirety by a review of the Congressional Record and from the relevant portions of the Seventh Circuit's decision in *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 745-46 (9th Cir.1993) (holding that a former employee of a government contractor who brought an action against the contractor under the *qui tam* provisions of the FCA met the Article III standing requirements, and did not violate the Due Process Clause of the U.S. Constitution).

[13] The term "*qui tam*" is short for "*qui tam pro domino rege quam pro se imposo sequitur*," which is interpreted as "he who brings the action as well for the king as for himself." *Bass Anglers Sportsman's Soc'y of America v. U.S. Plywood-Champion Papers, Inc.*, 324 F.Supp. 302, 305 (S.D.Tex.1971).

action based on the same underlying facts. *Id.* § 3730(e)(3). Nor may a private party litigate a *qui tam* suit based upon the public findings of a government investigation or on disclosures made in the news media, unless that party is an original and independent source of the information on which the complaint is based. *Id.* § 3730(e)(4)(A)-(B).

Upon bringing a *qui tam* action, a relator must serve on the government a copy of the complaint and written disclosures of substantially all material evidence and information the relator possesses. The complaint must be filed *in camera* and remain under seal for at least sixty (60) days so that the government may investigate the relator's allegations; though upon a showing of "good cause," the government may move the court for an extension of the sixty (60) day period. *Id.* § 3730(b)(2), (3). By the end of the period provided for the government to complete its investigation, the government must decide whether to intervene and proceed with the action, "in which case the action shall be conducted by the government;"[14] or whether to decline to take over the action, "in which case the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4)(B).

The original version of the FCA allowed anyone to bring a *qui tam* action and receive up to fifty percent (50%) of the amount recovered. S.Rep. No. 99-345, at 8-10 (1986). This broad provision led to abuse and in 1943, following the Supreme Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546-47, 63 S.Ct. 379, 87 L.Ed. 443 (1943),[15] Congress amended the statute. The 1943 version of the FCA precluded actions "based on evidence or information

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[14] *Id.* § 3730(b)(4)(A).

[15] In *United States ex rel. Marcus*, the Supreme Court held that a relator could bring a *qui tam* action even though the action was based entirely upon information contained in the government indictment. *Id.*, 317 U.S. at 546-47, 63 S.Ct. 379.

the Government had when the action was brought." *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1153 (3d Cir.1991). This led to claims being barred even in cases where the *qui tam* supplied the information to the government before filing the claim. *See United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1106-07 (7th Cir.1984).[16]

In 1986, Congress again amended the FCA in order "to encourage any individual knowing of governmental fraud to bring that information forward." S.Rep. No. 99-345, at 2 (1986). According to the Third Circuit, "[t]o revitalize the *qui tam* provisions, the amendment provided incentives for private enforcement, including increased monetary awards, adopted a lower burden of proof, and allowed a *qui tam* to remain a party in the action even if the government intervenes." *Stinson*, 944 F.2d at 1154.

B. *Damages Under The FCA*

The FCA itself does not specify how to quantify damages, but states instead that the government should be awarded damages that it "sustains because of" the contractor's fraudulent acts. 31 U.S.C. § 3729(a). Damages under the FCA are intended to "provide for restitution to the government of money taken from it by fraud. . . ."[17] *United States ex rel. Marcus*, 317 U.S. at 551, 63 S.Ct. 379. Trebling the damages

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[16] The holding in *United States ex rel. Wisconsin*, was subsequently superseded by statute in a number of states (including Illinois, California, Maryland, Oklahoma, Virginia, Wisconsin, and Vermont).

[17] The government is entitled to recover forfeitures even without proof of any damages or proof that payment was made on the claims. *See* S.Rep. No. 345, at 8 (1986); *see also United States v. McLeod*, 721 F.2d 282, 285 (9th Cir.1983) (The "damages provision of the False Claims Act is meant not only to compensate the government fully but also to deter fraudulent claims from being filed against it.").

and imposing penalties "were chosen to make sure that the government would be made completely whole." *Id.* at 551-52, 63 S.Ct. 379.

Because each case under the FCA involves unique types of damages to the government, a formula for calculating damages must be created for each case that will provide the government with the damages directly caused by the filing of a false claim. *BMY—Combat Sys. Div. of Harsco Corp. v. United States*, No. 90-252 C, 1999 WL 456960, at *7, 44 Fed. Cl. 141 (July 7, 1999). As the Ninth Circuit stated, "[o]rdinarily the measure of the government's damages would be the amount that it paid out by reason of the false [claims] over and above what it would have paid if the claims had been truthful." *United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir.1966).

Courts utilize several methods of calculation intended to ensure that the government receives "the benefit of its bargain," being careful not to award consequential damages. *See BMY—Combat Sys.*, 1999 WL 456960, at *7 (citing *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir.1972)) ("[T]he language of the False Claims Act does not include consequential damages resulting from delivery of defective goods."). Although the *Aerodex* court firmly rejected consequential damages, the Sixth Circuit has awarded "repair" expenses to the government in a similar case. *See United States v. Ekelman & Assocs., Inc.*, 532 F.2d 545, 547-551 (6th Cir.1976) (finding that the government should be awarded not only its losses due to the defendant's loan default, but also its maintenance and repair costs after foreclosure).

C. *FCA Case Law Applied*

As amended in 1986, the False Claims Act provides that the terms "'knowing and knowingly' mean that a person, with respect to information: (1) has actual knowledge of the

information, (2) acts in deliberate ignorance of the truth or falsity of the information, or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." 31 U.S.C. § 3729(b).

The archetypal *qui tam* action is filed by an insider at a private company who discovers his employer has over-charged for services or supplies under a government contract. *See, e.g., United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 968-69 (9th Cir.1995) (holding that a former employee of a federal contractor, who had signed a release of all claims against contractor in settlement of earlier litigation, brought *qui tam* action against contractor under FCA and was allowed to sue contractor). However, FCA actions have also been sustained under theories of supplying substandard products or services;[18] false negotiation, including bid rigging and defective pricing;[19] and false certification.[20] *See United States ex rel. Compton*, 142 F.3d at 303-04.

In *United States v. Bornstein*, 423 U.S. 303, 311, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976), the Supreme Court interpreted the FCA to differentiate contracts from claims[21] submitted under contracts, holding that only the latter gave rise to liability under the FCA. The Court held that the defendant is

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[18] *See Aerodex*, 469 F.2d at 1003.

[19] *See United States v. Ehrlich*, 643 F.2d 634 (9th Cir.1981).

[20] *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir.1996).

[21] The term "claim" is defined in 31 U.S.C. § 3729(c) of the False Claims Act and provides, in pertinent part, that:

> For purposes of this section, 'claim' includes any request or demand, whether under a contract or otherwise, for money or property, which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

liable under the statute because he engaged in conduct that caused the false claims to be submitted to the United States, and the Court explained that:

> While it is true that no false claims would have been submitted had [the defendant] and [its prime contractor] not entered into a contractual relationship, the entry into that relationship did not in itself cause the submission of any false claims . . . The language of the statute focuses on false claims, not on contracts.

Id. at 311, 96 S.Ct. 523 (discussing *United States ex rel. Marcus*, 317 U.S. at 552, 63 S.Ct. 379). Similarly, in *United States v. Ueber*, 299 F.2d 310, 313 (6th Cir.1962), the Sixth Circuit held that a cause of action under the FCA did not arise "until the first voucher seeking payment of the false claims was presented to the United States." *See also Ekelman & Assocs.*, 532 F.2d at 551-52 (stating that "no cause of action arises . . . until the [defendant] presents a claim to the [government] for payment . . ."). In another case, the Sixth Circuit explained that if the "government [is] seeking to state a claim under the FCA [it] must allege a false claim for payment made upon the government, not merely a fraudulent contract." *Kaminski v. Teledyne Industries, Inc.*, No. 96-3621, 1997 WL 415314, at *4 (6th Cir. July 21, 1997).

D. *Threshold Issue*.

Neither the Government nor Relator cites to a single case in which the Government was able to recover under the FCA for damages that would otherwise be excluded by the HVIC. Similarly, the only case cited by Defendant that allegedly stands for the proposition that a contractor could successfully defend against a governmental-entity using a limited liability provision is *United States v. United States Cartridge Co.* However, *United States Cartridge* did not directly involve the HVIC (which was not promulgated until 1971), nor did it

involve a modern version of the FCA. In fact, after a comprehensive case law search of all of the federal districts in the United States, this Court has been unable to locate any case on point with the facts and issues presented by the Parties in the instant matter. Indeed, even Defendant concedes that, as far as it is aware, "this litigation marks the first time that the [G]overnment has brought suit to recover damages under the FCA that would be [otherwise] disallowed by the High-Value Items Clause" (doc. 340). As stated above, the pleadings of Plaintiffs [22] and Defendant [23] offer several opposing theories, rationales, and defenses as to whether the HVIC is, or is not, a valid defense to the Government's claims under the FCA.

Since the Court is satisfied that the Parties are correct in that this action is a case of first impression in the federal courts of the United States, the threshold issue in this matter is "Whether the High-Value Items Clause is applicable or acts as a valid affirmative defense to claims filed under the False Claims Act, Title 31 U.S.C. §§ 3729-3733."

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[22] Some examples of the Plaintiffs' theories as to why the HVIC is not a valid affirmative defense to its claims under the FCA are that: (1) the plain language of the HVIC applies only to contractual remedies; (2) a regulation such as the HVIC cannot abrogate or limit a statute enacted by Congress, such as the FCA; and (3) only the Attorney General of the United States can compromise a claim under the FCA (doc. 296).

[23] Some examples of Defendant's theories as to why the HVIC acts as a complete defense to Plaintiffs' claims under the FCA are that: (1) the HVIC prohibits recovery for the claimed damages; (2) the HVIC was intended to preclude these damages, regardless of the Government's cause of action or theory of recovery; and (3) the Government's express "assumption of risk" through a contract clause is enforceable, and is fully compatible with the Attorney General's authority to conduct litigation (doc. 340).

IV. *The High-Value Items Clause* [24]

A. *"The Clause"*

Military procurement contracts with the DOD generally include certain limitations of contractual liability, which are provided for in the Federal Acquisition Regulations and are subsequently codified in the Code of Federal Regulations. One of these provisions, known as the High-Value Items Clause, provides a "limit[ation] of contractor liability for loss or damages to the property of the Government that (a) occurs after acceptance,[25] and (b) results from defects or deficiencies in the supplies delivered or the services performed." 48 C.F.R. § 46.800 (1999). The military procurement contracts for providing the CH-47(D) helicopters to the Army included the HVIC, which states, in pertinent part, that:

> (a) Except as provided in paragraphs (b) through (e) below, and notwithstanding any other provision of this contract, the Contractor shall not be liable for loss of or damage to property of the Government (including the supplies delivered under this contract) that (1) occurs after the Government's acceptance of the supplies delivered under this contract, and (2) results from, any defects or deficiencies in the supplies.
>
> (b) The limitation of liability under paragraph (a) above shall not apply when a defect or deficiency in, or the Government's acceptance of, the supplies results from the willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel. The term "Contractor's managerial personnel," as used in this clause, means the Contractor's director's, officers, and any of the Contractor's managers, superintendents, or equivalent representatives . . .

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[24] *See* 48 C.F.R. § 52.246-24 (1999).

[25] For purposes of this Motion, the Government has conceded that "acceptance" has occurred (*see* doc. 296).

> (c) If the Contractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the Government through the purchase or use of the supplies required to be delivered under this contract, the Contractor shall be liable to the Government, to the extent of such insurance or reserve, for the loss of or damage to property of the Government occurring after the Government's acceptance of, and resulting from any defects or deficiencies in, the supplies delivered under this contract.
>
> (d)(1) This clause does not diminish the Contractor's obligations, to the extent that they arise otherwise under this contract, relating to correction, repair, replacement, or other relief for any defect or deficiency in supplies delivered under this contract . . . .

48 C.F.R. § 52.246-24(a)-(d) (1999).

B. *Historical Background*

The HVIC embodies a long-standing practice of the DOD to self-insure for damage to high-value items. This practice was put in writing in 1971 following the loss of a military aircraft, purportedly as a result of a defective landing gear, that had been purchased by the U.S. Navy and resold to the Australian Navy (doc. 340, Ex. 5). *See Menasco*, Civ. No. 69-1623-WPG, at 2. The Government of Australia sued the manufacturer and its subcontractor, seeking tort, contract, and products liability damages for the loss of the aircraft. *Id.* at 2; *see also Comm'n Report* at 91-93 (*see* doc. 340, Ex. 6). Based on the record before it, the district court in *Menasco* found that it was:

> [T]he practice of the United States Navy not to make damage claims against the manufacturers of military aircraft that it purchased for its own use, in the event of [the] loss of such aircraft. This practice was followed

> irrespective of any conclusion that the Navy might hold with respect to such matters as negligence or breach of warranty on the part of the manufacturer.

Menasco, Civ. No. 69-1623-WPG, at 2. The court further found that this practice had two principal purposes: (a) to encourage the manufacturer to refrain from obtaining products liability insurance and passing the costs of the premiums on to the Navy; and (b) to encourage the manufacturers to cooperate fully, without apprehension, in the investigation into the causes of any crashes, in order that such causes might be overcome and similar accidents thereby avoided in the future. *Id.* at 2-3.[26] The *Menasco* court also found that the U.S. Navy could have been estopped from pursuing any claim based on the loss of the aircraft because the airframe industry "was well aware of such practice and acted in reliance thereon."[27] *Id.* at 3.

The Commission on Government Procurement similarly reported that, prior to *Menasco*, defense contractors:

> [U]nderstood that the general practice of the government in military contracting was to accept the risk for loss or damage except for the warranted items that were defective . . .
>
> The history of the government's pursuit of claims for lost or damaged property supports the industry understanding of the unwritten policy of self-insurance.

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[26] *See also Can a Company be a Little Bit Liable?*, Business Week, Oct. 18, 1969, at 59 (discussing the fact that if the government did not assume the risk for losses resulting from crashes of aircraft built for its own use, a subcontractor could be at risk for damages far in excess of the value of its contract) (*see* doc. 340, Ex. 7).

[27] Nonetheless, the court held that the protections afforded by the practice of the U.S. Navy did not preclude the ultimate purchaser of the aircraft, Australia, from seeking such damages from the contractor. *Menasco*, Civ. No. 69-1623-WPG, at 4-5.

> Except for nominal repairs and replacements, there is little precedent in the courts, boards of contract appeals, or the General Accounting Office on claims against contractors . . . for recovery of such damages.

Comm'n Report at 92.

The filing of the *Menasco* suit engendered numerous expressions of concern from defense contractors, prompting the DOD to formalize its unwritten practice. *Id.* In 1971, the DOD issued *Defense Procurement Circular 86*, which sets forth the Armed Services Procurement Regulations limiting contractor liability for defects. This was the prototype for the modern version of the High-Value Items Clause.

V. *The Court's Analysis*

A. *The High-Value Items Clause Is Inapplicable To False Claims Act Cases.*

This Court holds as a matter of law that the Third Affirmative Defense asserted by Defendant, which invokes the High-Value Items Clause, set forth in 48 C.F.R. §§ 46.800 *et seq.* & 52.246-24 (1999), and incorporated into the contracts between the Government and Boeing, provides no defense to the Government's and Relator's claims against Boeing for violations of the False Claims Act. As a point of clarification, we note that this Court is not holding that the High-Value Items Clause is void and without effect when applied to the statutory or common-law claims.[28] In fact, we believe that the High-Value Items Clause may be used by a defendant as a defense to a breach of contract or negligence action in order to limit defendant's liability for any loss, destruction, or damage to governmental property in situations

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[28] Nor is this Court rendering a judgment at this time as to the issue of the merits of liability against Defendant in regards to the FCA or to the other fraud, contract, and tort claims that have been alleged by the Government and Relator in this action.

where there is no proof of "willful misconduct" or "lack of good faith" by a defendant's managerial personnel. *See* 48 C.F.R. 46.803(d)(2) (1999). However, the High-Value Items Clause cannot be construed to preclude or limit liability damages for violations of the False Claims Act. The very language of the enabling regulation, F.A.R. § 46.800 *et seq.* which authorizes the HVIC in DOD contracts, limits its application to contractual remedies. Yet, claims under the False Claims Act are not contractual remedies. Therefore, the High-Value Items Clause is applicable only to contractual remedies and not to claims premised under the False Claims Act. Several aspects of the HVIC and the FCA lead this Court to this conclusion.

First, the HVIC itself is silent as to whether the HVIC applies to FCA claims, and, conversely, the FCA is silent as to whether the HVIC provides a contractor-defendant an affirmative defense to violations under the statute.[29] Congress deliberately set the FCA damages provision apart from other types of damages, including tort and contract damages. This Court is not willing to interpret the FCA or the HVIC in the way that Defendant wants in this case. *See Pickens v. Kanawha River Towing*, 916 F.Supp. 702, 705 (S.D.Ohio) ("Courts should give effect to two statutes that overlap unless there is a 'positive repugnancy between the two laws.'") (quoting *Connecticut National v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)) Moreover, the power to amend the Act rests with the Congress and not this Court. The very fact that Congress was willing to amend the

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[29] Common defenses to FCA actions include: (1) negligence or innocent mistake; (2) criminal penalties and civil damages that may violate double jeopardy; (3) substantial compliance; and (4) governmental acquiescence. *See* Paul W. Morenberg, Comment, *Environmental Fraud by Government Contractors; A New Application of the False Claims Act*, 22 B.C. Envtl. Aff. L.Rev. 623, 645-46 (1995).

terms and provisions of the FCA in 1943 [30] and 1986,[31] while not including the application of the HVIC as a limitation or defense to the statute's penalty provisions is powerful evidence that Congress never planned for the HVIC's applicability to the FCA. This Court can only highlight that, as of the date of this Order, both the FCA and the HVIC are silent in regards to each other, and until Congress says otherwise, we cannot substitute our judgment for the will of Congress. *See Pickens*, 916 F.Supp. at 705 ("Generally federal law disfavors preemption of one federal law by another, unless there is an 'express manifestation of intent.'") (quoting *United States v. General Dynamics*, 19 F.3d 770, 774 (2d Cir.1994)).

Second, claims under the FCA do not arise pursuant to a contract.[32] *See United States v. Woodbury*, 359 F.2d 370, 377 (9th Cir.1966) (finding that the legal basis of claims is an

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[30] For example, the 1943 Amendments to the FCA effectively restrained the relator when Congress voted to bar *qui tam* suits that utilized information possessed by the government, even in cases where the relator discovered the alleged fraud. S.Rep. No. 99-345, at 11-12 (1986). In addition, Congress instituted a notice requirement that compelled the *qui tam* relators to advise the government of their claims and to disclose all significant evidence. *Id.* at 12. The amendments also allowed the United States to join the *qui tam* suits and to control the litigation strategy. *Id.*

[31] The 1986 amendments effectively revitalized the relator by expanding the FCA definition of fraud, increased both statutory fines and damages, liberalized the requirements for standing, and enhanced relator awards. *See* Michael S. McGarry, *Winning the War on Procurement Fraud: Victory at What Price?*, 26 Colum. J.L. & Soc. Probs. 249, 257 (1993).

[32] There are three central elements of a FCA action: (1) a claim that is presented to the government; (2) that is false or fraudulent; and (3) that claim is presented to the government by a "knowing" defendant. *See* Title 31 U.S.C. 3729(a).

Note: That the terms and provisions of the contract, or the "contract" itself, is not an element of a FCA violation.

intentional violation of the FCA and is not a mere breach of contract); *see also Ueber*, 299 F.2d at 313 (finding that the FCA was violated not by merely entering into a contract, but by the submission of fraudulent vouchers for payment). Claims under the FCA arise when a person knowingly presents or causes to be presented a false or fraudulent claim, or knowingly makes, uses or causes to be made or uses a false record or statement to get a false or fraudulent claim paid. *See, e.g.*, Title 31 U.S.C. § 3729(a)-(c) (defining a "claim" as "any request or demand, whether under contract or otherwise, for money or property . . ."); *United States v. Neifert-White Co.*, 390 U.S. 228, 233, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968) ("This remedial statute reaches beyond 'claims' which might be legally enforced to [include] all fraudulent attempts to cause the government to pay out sums of money."); *McLeod*, 721 F.2d at 284-85 (concluding that a "knowing endorsement" of a mistakenly issued Treasury check is a false claim). As we concluded above, the appropriate reading of the HVIC is one that is consistent with the plain language of both the HVIC itself and the FCA. Since claims brought under the FCA are not contract-based claims or dependent upon the degree of negligence involved, the claims are unimpaired by contractual limitations on liability.[33]

Third, there is no evidence that the DOD intended that the HVIC have such an impact on FCA claims. In fact, all of the historical records concerning the *Menasco* case focused upon contractual and products liability/negligence claims. *See Menasco*, Civ. No. 69-1623-WPG, at 2 (noting that it was not the practice of the Navy to make damage claims against the aircraft manufacturers for "negligence or breach of

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[33] The F.A.R. expressly states that "[i]n contracts requiring delivery of high-value items, the Government will relieve contractors of contractual liability [not necessarily liability based on fraud or fraudulent conduct] for loss or damage to those items." 48 C.F.R. § 46.803(b) (1999) (brackets added).

warranty"); *see also In re Gulf & Midlands Barge Line, Inc.*, 509 F.2d at 719-20 (finding that the contract provided that the towing company would not be liable for "any peril", including the negligence of the crew). Therefore, Defendant's argument that, as a result of the *Menasco* case, and its progeny, the HVIC was promulgated to limit contractor liability under the FCA, is without support.

Finally, Defendant cites to the case of *United States Cartridge* as being directly on point with the issues at bar. The Court recognizes that this is the only case cited by either Party that addresses the issue of the limitation of liability in regards to a defendant-contractor being sued by the government under a prior version of the FCA. *See United States Cartridge*, 198 F.2d at 457-58. In addition, Defendant is correct when it asserts that the Eighth Circuit ultimately held in favor of the contractor and against the government when the court found that the contract provision pertaining to the limitation of liability did limit the government's claims under the FCA. *Id.* at 465.

However, this Court finds that the case of *United States Cartridge* is distinguishable in many respects from the case at bar. First, the underlying theme throughout the case was the exigencies of the then-imminent World War II, and the case was decided under an earlier version of the War Powers Act. *Id.* at 463. Second, the government contracts required the munitions contractor to hire a whole new and untrained workforce and to build munition factories under the direct control and supervision of the government. *Id.* at 463-64. The Eighth Circuit expressly stated that the analysis of the case would not be applicable to:

> [T]he conventional relationship between the government and a commercial corporate contractor not subject to government supervision and control, for the supplying of goods and services, and if the provisions limiting liability were to be viewed merely as an attempt to relieve

> such a contractor from liability for its own fraud, [then] the government's argument [that public policy precluded enforcement of the limitation of liability clause] might perhaps be unanswerable . . .
>
> *But this was not a conventional government contract made under normal conditions; it was an unusual arrangement made to meet a crisis.*

Id. at 464 (emphasis added). The Eighth Circuit also found that the contract in question was "replete with provisions for the [government] to retain control over the operation of the plant and its personnel, even though they are designated as defendant's employees." *United States Cartridge*, 198 F.2d at 463. These are but a few of the unique facts, circumstances, and issues in *United States Cartridge* which we find to be completely distinguishable or absent from the instant matter. To compare the emergency situation and unique facts and circumstances of *United States Cartridge*, in which the munition facilities and its employees were "in reality . . . an instrumentality of the government," [34] is simply wrong; and misses the mark between extensive governmental control of a prime contractor,[35] and limited governmental monitoring. Thus, this Court does not find *United States Cartridge* to be persuasive or applicable in the case at bar.

Accordingly, The Government's Motion for Partial Summary Judgment as to Defendant's Third Affirmative Defense Re: The High-Value Items Clause (doc. 296) is found to be well-taken, and is hereby GRANTED and Defendant's Third Affirmative Defense is DISMISSED.

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[34] *Id.* at 464.

[35] The Eighth Circuit noted that, "Congress, we believe, clearly intended to give the Secretary of War virtually a freehand in providing the means of meeting the emergency which existed." *United States Cartridge*, 198 F.2d at 463.

CONCLUSION

For the foregoing reasons, Aerospace's Motion for Leave to Participate as *Amicus Curiae* (doc. 402) is GRANTED, and the Government's Motion for Partial Summary Judgment (doc. 296) is also GRANTED. Accordingly, Defendant's Third Affirmative Defense re: The High-Value Items Clause is hereby DISMISSED

SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed [illegible] 18, 2000]

No. 00-0309

UNITED STATES OF AMERICA, ex rel. BRETT ROBY,
Plaintiffs-Respondents,

v.

THE BOEING COMPANY,
Defendant-Petitioner.

ORDER

Before: JONES, RYAN, and CLAY, Circuit Judges.

The defendant in this action under the False Claims Act seeks permission to appeal two questions that the district court has certified pursuant to 28 U.S.C. § 1292(b) for interlocutory appeal:

> 1. Whether the United States can recover damages under the False Claims Act for loss of a helicopter resulting from the failure of a defective flight-critical component part; and
>
> 2. Whether the High-Value Items Clause contained in the Federal Acquisition Regulations § 52.246-24 and incorporated in the Boeing CH-47D helicopter contract operates as a defense to damages sought under the False Claims Act for the loss of or damage to a helicopter resulting from the failure of a defective component part.

The plaintiffs concur in the petition.

Upon consideration, the petition for permission to appeal hereby is GRANTED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed Aug. 3, 2000]

CASE NO. C-1-95-375
JUDGE S. ARTHUR SPIEGEL

UNITED STATES OF AMERICA *ex rel.* BRETT ROBY,
Plaintiff,

v.

THE BOEING COMPANY,
Defendant.

ORDER TO AMEND AND CERTIFY

This Court hereby determines, for the reasons stated below, that, pursuant to 28 U.S.C. § 1292(b), the Court's Orders of November 2, 1999 and December 30, 1999 and the Order denying The Boeing Company's Motion to Reconsider in Part the Court's Order of December 30, 1999 involve the following controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal will materially advance the ultimate termination of the litigation:

> In August 1990, pursuant to a contract to re-manufacture CH-47D helicopters for the Army, Boeing delivered a re-manufactured CH-47D helicopter to the Army and submitted a claim(s) for payment to the Government for the re-manufactured helicopter. Between delivery and January 1991, the helicopter flew 56 flight hours. On January 11, 1991, a defective flight-critical transmission

gear failed resulting in the helicopter being destroyed. A new CH-47D helicopter was purchased from Boeing to replace the destroyed helicopter.

Assuming arguendo that the necessary elements of the False Claims Act are satisfied, the following questions of law arise:

1. Whether the United States can recover damages under the False Claims Act for loss of a helicopter resulting from the failure of a defective flight-critical component part; and

2. Whether the High-Value Items Clause contained in the Federal Acquisition Regulations § 52.246-24 and incorporated in the Boeing CH-47D helicopter contract operates as a defense to damages sought under the False Claims Act for the loss of or damage to a helicopter resulting from the failure of a defective component part.

The Parties agree that resolution of these two questions of law do not involve disputed issues of fact.

These issues involve controlling questions of law as to which there is substantial ground for difference of opinion. With respect to the first question, whether the Government may recover damages under the False Claims Act for loss of a helicopter resulting from the failure of a defective flight critical component part is an issue that courts have not addressed. With respect to the second question, the High-Value Items Clause ("HVIC") is a procurement provision contained in numerous Government contracts including the helicopter contracts at issue in this case. The Boeing Company asserts that the HVIC operates as a limitation on damages available under the False Claims Act ("FCA"). The Government contends that the HVIC is not a defense to damages under the Act. Whether the HVIC operates as a defense to FCA damages is an issue of first impression in the

federal courts of the United States and there are no other cases directly on point. The Court has found that the defense and aerospace industry has an important interest in seeing the issue resolved.

Furthermore, this Court finds that an immediate interlocutory appeal will materially advance the ultimate termination of this litigation. Pursuant to two separate settlement agreements dated August 3, 2000 between Boeing and the United States and Boeing and Relator Brett Roby, respectively, if the Sixth Circuit Court of Appeals accepts for interlocutory review, and decides on the merits, these two controlling questions of law, the parties have agreed to a settlement of all outstanding claims in this case. Without interlocutory review, the parties will proceed to a trial which is expected to take several months. By the terms of the settlement agreements, the parties have stipulated to the two legal questions for appellate review.[1]

This Court therefore concludes that these issues should be certified under 28 U.S.C. § 1292(b) for interlocutory appeal and that the Court's Orders of November 2, 1999 and December 30, 1999 and the Order denying The Boeing

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[1] The agreements provide in relevant part that for purposes of the appeal, the parties will and have stipulated that i) the loss of the helicopter was the result of the failure of the defective flight-critical gear; ii) they will not argue to the reviewing courts that there needs to be any additional fact-finding on the two Damages Issues; iii) the exceptions to the High-Value Items Clause, found at F.A.R. § 52.246-24(b) and (c) (Apr. 1984), based on the Contractor having insurance or there being willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel, are not at issue; iv) the version of the False Claims Act in effect at the date of the Agreement and the version of the High-Value Items Clause incorporated into the helicopter contracts, F.A.R. § 52.246-24 (Apr. 1984), shall govern this appeal; and v) the helicopter at issue is a high-value item under the High-Value Items Clause.

Company's Motion to Reconsider in Part the Court's Order of December 30, 1999 are hereby amended to reflect this certification.

Date: 8/3/00 /s/ [illegible]
S. ARTHUR SPIEGEL
United States Senior District Court Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Jan. 24, 2003]

No. 00-4157

UNITED STATES OF AMERICA, EX REL. BRETT ROBY,
Plaintiffs-Appellees,

v.

BOEING COMPANY,
Defendant-Appellant.

ORDER

BEFORE: MERRITT, BOGGS, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Boggs would grant rehearing for the reasons states in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

APPENDIX G

10 U.S.C. § 2202. Regulations on procurement, production, warehousing, and supply distribution functions

The Secretary of Defense shall prescribe regulations governing the performance within the Department of Defense of the procurement, production, warehousing, and supply distribution functions, and related functions, of the Department of Defense.

(Aug. 10, 1956, c. 1041, 70A Stat. 120; Dec. 4, 1987, Pub.L. 100-180, Div. A, Title XII, § 1202, 101 Stat. 1153; Oct. 13, 1994, Pub.L. 103-355, Title III, § 3061(a), 108 Stat. 3336.)

31 U.S.C. § 3729. False claims

(a) Liability for certain acts.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub.L. 99-562, § 2, Oct. 27, 1986, 100 Stat. 3153; Pub.L. 103-272, § 4(f)(1)(O), July 5, 1994, 108 Stat. 1362.)

31 U.S.C. § 3731. False claims procedure

* * * *

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

* * * *

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 979; Pub.L. 99-562, § 5, Oct. 27, 1986, 100 Stat. 3158.)

41 U.S.C. § 405. Authority and functions of the Administrator

(a) Development of procurement policy; leadership

The Administrator shall provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. To the extent that the Administrator considers appropriate, in carrying out the policies and functions set forth in this chapter, and with due regard for applicable laws and the program activities of the executive agencies, the Administrator may prescribe Government-wide procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be followed by executive agencies in the procurement of—

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

* * * *

(Pub.L. 93-400, § 6, Aug. 30, 1974, 88 Stat. 797; Pub.L. 96-83, § 4, Oct. 10, 1979, 93 Stat. 649; Pub.L. 98-191, § 5, Dec. 1, 1983, 97 Stat. 1326; Pub.L. 98-369, Div. B, Title VII, § 2732(b)(1), July 18, 1984, 98 Stat. 1199; Pub.L. 100-679, § 3(a), Nov. 17, 1988, 102 Stat. 4055; Pub.L. 103-355, Title I, § 1091(b)(2), Title V, §§ 5051(b), 5091, Title VII, § 7108(a), (b), Oct. 13, 1994, 108 Stat. 3272, 3351, 3361, 3378; Pub.L. 104-106, Div. D, Title XLIII, §§ 4307(b), 4321(h)(1), (2), 4322(a)(1), Div. E, Title LVI, § 5607(d), Feb. 10, 1996, 110 Stat. 668, 675, 677, 702; Pub.L. 104-201, Div. A, Title X, § 1074(f)(1), Sept. 23, 1996, 110 Stat. 2661; Pub.L. 105-85, Div. A, Title VIII, § 851(b), Title X, § 1073(g)(2)(B), Nov. 18, 1997, 111 Stat. 1851, 1906; Pub.L. 105-135, Title VI, § 604(f)(1), Dec. 2, 1997, 111 Stat. 2634.)

APPENDIX H

48 C.F.R. § 1.103. Authority.

(a) The development of the FAR System is in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974 (Pub.L. 93-400), as amended by Pub.L. 96-83.

(b) The FAR is prepared, issued, and maintained, and the FAR System is prescribed, jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator, National Aeronautics and Space Administration, under their several statutory authorities.

[51 Fed. Reg. 27116, July 29, 1986; (FAC) 90-29, FAR Case 95-10, Item I, 60 Fed. Reg. 34733, July 3, 1995; (FAC) 97-18, (FAR) Case 2000-605, Item I, 65 Fed. Reg. 36014, June 6, 2000]

48 C.F.R. § 1.104. Applicability.

The FAR applies to all acquisitions as defined in Part 2 of the FAR, except where expressly excluded.

[(FAC) 90-29, FAR Case 95-10, Item I, 60 Fed. Reg. 34733, July 3, 1995]

48 C.F.R. § 31.205-19. Insurance and indemnification.

(a) Insurance by purchase or by self-insuring includes coverage the contractor is required to carry, or to have approved, under the terms of the contract and any other coverage the contractor maintains in connection with the general conduct of its business. Any contractor desiring to establish a program of self-insurance applicable to contracts that are not subject to 48 CFR 9904.416, Accounting for Insurance Costs, shall comply with the self-insurance

requirements of that standard as well as with part 28 of this Regulation. However, approval of a contractor's insurance program in accordance with part 28 does not constitute a determination as to the allowability of the program's cost. The amount of insurance costs which may be allowed is subject to the cost limitations and exclusions in the following subparagraphs.

* * * *

(2) Costs of insurance maintained by the contractor in connection with the general conduct of its business are allowable, subject to the following limitations:

* * * *

(iv) Costs of insurance for the risk of loss of or damage to Government property are allowable only to the extent that the contractor is liable for such loss or damage and such insurance does not cover loss or damage that results from willful misconduct or lack of good faith on the part of any of the contractor's directors or officers or other equivalent representatives.

* * * *

[50 Fed. Reg. 23607, June 4, 1985; 51 Fed. Reg. 31426, Sept. 3, 1986; (FAC) 90-12; (FAR) Case 92-18, 57 Fed. Reg. 39591, Aug. 31, 1992; (FAC) 90-23, (FAR) Case 92- 18, Item XIX, 59 Fed. Reg. 67042, Dec. 28, 1994]

48 C.F.R. § 46.801. Applicability.

(a) This subpart applies to contracts other than those for (1) information technology, including telecommunications, (2) construction, (3) architect-engineer services, and (4) maintenance and rehabilitation of real property. This subpart does not apply to commercial items.

* * * *

[(FAC) 90-41, (FAR) Case 96-319, Item I, 61 Fed. Reg. 41471, Aug. 8, 1996; (FAC) 97-03, (FAR) Case 96-319, Item II, 62 Fed. Reg. 64914, Dec. 9, 1997; (FAC) 2001-01, (FAR) Case 2000-303, Item II, 66 Fed. Reg. 53484, Oct. 22, 2001]

48 C.F.R. § 46.802. Definition.

"High-value item," as used in this subpart, means a contract end item that (a) has a high unit cost (normally exceeding $100,000 per unit), such as an aircraft, an aircraft engine, a communication system, a computer system, a missile, or a ship, and (b) is designated by the contracting officer as a high-value item.

48 C.F.R. § 46.803. Policy.

(a) General. The Government will generally act as a self-insurer by relieving contractors, as specified in this subpart, of liability for loss of or damage to property of the Government that (1) occurs after acceptance of supplies delivered or services performed under a contract and (2) results from defects or deficiencies in the supplies or services. However, the Government will not relieve the contractor of liability for loss of or damage to the contract end item itself, except for high-value items.

(b) High-value items. In contracts requiring delivery of high-value items, the Government will relieve contractors of contractual liability for loss of or damage to those items. However, this relief shall not limit the Government's rights arising under the contract to—

(1) Have any defective item or its components corrected, repaired, or replaced when the defect or deficiency is discovered before the loss of or damage to a high-value item occurs; or

(2) Obtain equitable relief when the defect or deficiency is discovered after such loss or damage occurs.

(c) Exception. The Government will not provide contractual relief under paragraphs (a) and (b) above when contractor liability can be preserved without increasing the contract price.

(d) Limitations. Subject to the specific terms of the limitation of liability clause included in the contract, the relief provided under paragraphs (a) and (b) above does not apply—

(1) To the extent that contractor liability is expressly provided under a contract clause authorized by this regulation;

(2) When a defect or deficiency in, or the Government's acceptance of, the supplies or services results from willful misconduct or lack of good faith on the part of the contractor's managerial personnel; or

(3) To the extent that any contractor insurance, or self-insurance reserve, covers liability for loss or damage suffered by the Government through purchase or use of the supplies delivered or services performed under the contract.

48 C.F.R. § 52.245-2. Government Property (Fixed-Price Contracts).

As prescribed in 45.106(b)(1), insert the following clause:

GOVERNMENT PROPERTY (FIXED-PRICE CONTRACTS) (DEC 1989)

* * * *

(g) Risk of loss. Unless otherwise provided in this contract, the Contractor assumes the risk of, and shall be responsible for, any loss or destruction of, or damage to, Government property upon its delivery to the Contractor or upon passage

of title to the Government under paragraph (c) of this clause. However, the Contractor is not responsible for reasonable wear and tear to Government property or for Government property properly consumed in performing this contract.

* * * *

(End of clause)

Alternate I (APR 1984). As prescribed in 45.106(b)(2), substitute the following paragraph (g) for paragraph (g) of the basic clause:

(g) Limited risk of loss.

(1) The term "Contractor's managerial personnel," as used in this paragraph (g), means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of—

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operation at any one plant or separate location at which the contract is being performed; or

(iii) A separate and complete major industrial operation connected with performing this contract.

(2) The Contractor shall not be liable for loss or destruction of, or damage to, the Government property provided under this contract (or, if an educational or nonprofit organization, for expenses incidental to such loss, destruction, or damage), except as provided in subparagraphs (3) and (4) below.

(3) The Contractor shall be responsible for loss or destruction of, or damage to, the Government property provided under this contract (including expenses incidental to such loss, destruction, or damage)—

(i) That results from a risk expressly required to be insured under this contract, but only to the extent of the insurance

required to be purchased and maintained, or to the extent of insurance actually purchased and maintained, whichever is greater;

(ii) That results from a risk that is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement;

(iii) For which the Contractor is otherwise responsible under the express terms of this contract;

(iv) That results from willful misconduct or lack of good faith on the part of the Contractor's managerial personnel; or

(v) That results from a failure on the part of the Contractor, due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, to establish and administer a program or system for the control, use, protection, preservation, maintenance, and repair of Government property as required by paragraph (e) of this clause.

(4)(i) If the Contractor fails to act as provided in subdivision (g)(3)(v) above, after being notified (by certified mail addressed to one of the Contractor's managerial personnel) of the Government's disapproval, withdrawal of approval, or nonacceptance of the system or program, it shall be conclusively presumed that such failure was due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel.

(ii) In such event, any loss or destruction of, or damage to, the Government property shall be presumed to have resulted from such failure unless the Contractor can establish by clear and convincing evidence that such loss, destruction, or damage—

(A) Did not result from the Contractor's failure to maintain an approved program or system; or

(B) Occurred while an approved program or system was maintained by the Contractor.

(5) If the Contractor transfers Government property to the possession and control of a subcontractor, the transfer shall not affect the liability of the Contractor for loss or destruction of, or damage to, the property as set forth above. However, the Contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of, or damage to, the property while in the subcontractor's possession or control, except to the extent that the subcontract, with the advance approval of the Contracting Officer, relieves the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received, except for reasonable wear and tear or for its use in accordance with the provisions of the prime contract.

(6) Upon loss or destruction of, or damage to, Government property provided under this contract, the Contractor shall so notify the Contracting Officer and shall communicate with the loss and salvage organization, if any, designated by the Contracting Officer. With the assistance of any such organization, the Contractor shall take all reasonable action to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the affected Government property in the best possible order, and furnish to the Contracting Officer a statement of—

(i) The lost, destroyed, or damaged Government property;

(ii) The time and origin of the loss, destruction, or damage;

(iii) All known interests in commingled property of which the Government property is a part; and

(iv) The insurance, if any, covering any part of or interest in such commingled property.

(7) The Contractor shall repair, renovate, and take such other action with respect to damaged Government property as the Contracting Officer directs. If the Government property is destroyed or damaged beyond practical repair, or is damaged and so commingled or combined with property of others (including the Contractor's) that separation is impractical, the Contractor may, with the approval of and subject to any conditions imposed by the Contracting Officer, sell such property for the account of the Government. Such sales may be made in order to minimize the loss to the Government, to permit the resumption of business, or to accomplish a similar purpose. The Contractor shall be entitled to an equitable adjustment in the contract price for the expenditures made in performing the obligations under this subparagraph (g)(7) in accordance with paragraph (h) of this clause. However, the Government may directly reimburse the loss and salvage organization for any of their charges. The Contracting Officer shall give due regard to the Contractor's liability under this paragraph (g) when making any such equitable adjustment.

(8) The Contractor represents that it is not including in the price and agrees it will not hereafter include in any price to the Government any charge or reserve for insurance (including any self-insurance fund or reserve) covering loss or destruction of, or damage to, Government property, except to the extent that the Government may have expressly required the Contractor to carry such insurance under another provision of this contract.

(9) In the event the Contractor is reimbursed or otherwise compensated for any loss or destruction of, or damage to, Government property, the Contractor shall use the proceeds to repair, renovate, or replace the lost, destroyed, or damaged Government property or shall otherwise credit the proceeds to or equitably reimburse the Government, as directed by the Contracting Officer. .

(10) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any

loss or destruction of, or damage to, Government property. Upon the request of the Contracting Officer, the Contractor shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where a subcontractor has not been relieved from liability for any loss or destruction of, or damage to, Government property, the Contractor shall enforce for the benefit of the Government the liability of the subcontractor for such loss, destruction, or damage.

Alternate II (JUL 1985). As prescribed in 45.106(b)(3), substitute the following paragraphs (c) and (g) for paragraphs (c) and (g) of the basic clause:

* * * *

(g) Limited risk of loss.

(1) The term "Contractor's managerial personnel," as used in this paragraph (g), means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of—

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operation at any one plant, laboratory, or separate location at which the contract is being performed; or

(iii) A separate and complete major industrial operation connected with performing this contract.

(2) The Contractor shall not be liable for loss or destruction of, or damage to, the Government property provided under this contract (or, if an educational or nonprofit organization, for expenses incidental to such loss, destruction, or damage), except as provided in subparagraphs (3) and (4) below.

(3) The Contractor shall be responsible for loss or destruction of, or damage to, the Government property provided under this contract (including expenses incidental to such loss, destruction, or damage)—

(i) That results from a risk expressly required to be insured under this contract, but only to the extent of the insurance required to be purchased and maintained, or to the extent of insurance actually purchased and maintained, whichever is greater;

(ii) That results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement;

(iii) For which the Contractor is otherwise responsible under the express terms of this contract;

(iv) That results from willful misconduct or lack of good faith on the part of the Contractor's managerial personnel; or

(v) That results from a failure on the part of the Contractor, due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, to establish and administer a program or system for the control, use, protection, preservation, maintenance, and repair of Government property as required by paragraph (e) of this clause.

(4)(i) If the Contractor fails to act as provided in subdivision (g)(3)(v) above, after being notified (by certified mail addressed to one of the Contractor's managerial personnel) of the Government's disapproval, withdrawal of approval, or nonacceptance of the system or program, it shall be conclusively presumed that such failure was due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel.

(ii) Furthermore, any loss or destruction of, or damage to, the Government property shall be presumed to have resulted from such failure unless the Contractor can establish by clear and convincing evidence that such loss, destruction, or damage—

(A) Did not result from the Contractor's failure to maintain an approved program or system; or

(B) Occurred while an approved program or system was maintained by the Contractor.

(5) If the Contractor transfers Government property to the possession and control of a subcontractor, the transfer shall not affect the liability of the Contractor for loss or destruction of, or damage to, the property as set forth above. However, the Contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of, or damage to, the property while in the subcontractor's possession or control, except to the extent that the subcontract, with the advance approval of the Contracting Officer, relieves the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received, except for reasonable wear and tear or for its use in accordance with the provisions of the prime contract.

(6) Upon loss or destruction of, or damage to, Government property provided under this contract, the Contractor shall so notify the Contracting Officer and shall communicate with the loss and salvage organization, if any, designated by the Contracting Officer. With the assistance of any such organization, the Contractor shall take all reasonable action to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the affected Government property in the best possible order, and furnish to the Contracting Officer a statement of—

(i) The lost, destroyed, or damaged Government property;

(ii) The time and origin of the loss, destruction, or damage;

(iii) All known interests in commingled property of which the Government property is a part; and

(iv) The insurance, if any, covering any part of or interest in such commingled property.

(7) The Contractor shall repair, renovate, and take such other action with respect to damaged Government property as the Contracting Officer directs. If the Government property is destroyed or damaged beyond practical repair, or is damaged and so commingled or combined with property of others (including the Contractor's) that separation is impractical, the Contractor may, with the approval of and subject to any conditions imposed by the Contracting Officer, sell such property for the account of the Government. Such sales may be made in order to minimize the loss to the Government, to permit the resumption of business, or to accomplish a similar purpose. The Contractor shall be entitled to an equitable adjustment in the contract price for the expenditures made in performing the obligations under this subparagraph (g)(7) in accordance with paragraph (h) of this clause. However, the Government may directly reimburse the loss and salvage organization for any of their charges. The Contracting Officer shall give due regard to the Contractor's liability under this paragraph (g) when making any such equitable adjustment.

(8) The Contractor represents that it is not including in the price, and agrees it will not hereafter include in any price to the Government, any charge or reserve for insurance (including any self-insurance fund or reserve) covering loss or destruction of, or damage to, Government property, except to the extent that the Government may have expressly required the Contractor to carry such insurance under another provision of this contract.

(9) In the event the Contractor is reimbursed or otherwise compensated for any loss or destruction of, or damage to, the Government property, the Contractor shall use the proceeds to

repair, renovate, or replace the lost, destroyed, or damaged Government property or shall otherwise credit the proceeds to or equitably reimburse the Government, as directed by the Contracting Officer.

(10) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss or destruction of, or damage to, Government property. Upon the request of the Contracting Officer, the Contractor shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where a subcontractor has not been relieved from liability for any loss or destruction of, or damage to, Government property, the Contractor shall enforce for the benefit of the Government the liability of the subcontractor for such loss, destruction, or damage.

[50 Fed. Reg. 26904, June 28, 1985; 54 Fed. Reg. 48995, Nov. 28, 1989]

48 C.F.R. § 52.245-8. Liability for the Facilities.

As prescribed in 45.302-6(b), insert the following clause:

LIABILITY FOR THE FACILITIES (JAN 1997)

* * * *

(c) The Contractor shall be liable for loss or destruction of, or damage to, the facilities, and for expenses incidental to such loss, destruction, or damage—

(1) That results from a risk expressly required to be insured under this contract, but only to the extent of the insurance required to be purchased and maintained, or to the extent of insurance actually purchased and maintained, whichever is greater;

(2) That results from a risk that is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement;

(3) For which the Contractor is otherwise responsible under the express terms of this contract;

(4) That results from willful misconduct or lack of good faith on the part of the Contractor's managerial personnel; or

(5) That results from a failure, due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel—

(i) To establish, maintain, and administer a system for control of the facilities in accordance with the "Property administration" paragraph of the Government Property clause; or

(ii) To maintain and administer a program for maintenance, repair, protection, and preservation of the facilities, in accordance with the "Property administration" paragraph of the Government Property clause, or to take reasonable steps to comply with any appropriate written direction that the Contracting Officer may prescribe as reasonably necessary for the protection of the facilities. If the Government Property clause does not include the "Property administration" paragraph, then the Contractor shall exercise sound industrial practice in complying with the requirements of this subdivision (c)(5)(ii).

* * * *

(End of clause)

[(FAC) 90-45, (FAR) Case 96-312, Item II, 62 Fed. Reg. 239, Jan. 2, 1997]

48 C.F.R. § 52.246-23. Limitation of Liability.

As prescribed in 46.805, insert the following clause:

LIMITATION OF LIABILITY (FEB 1997)

(a) Except as provided in paragraphs (b) and (c) below, and except for remedies expressly provided elsewhere in this contract, the Contractor shall not be liable for loss of or damage to property of the Government (excluding the supplies delivered under this contract) that (1) occurs after Government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies.

(b) The limitation of liability under paragraph (a) above shall not apply when a defect or deficiency in, or the Government's acceptance of, the supplies results from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel. The term "Contractor's managerial personnel," as used in this clause, means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of—

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operations at any one plant, laboratory, or separate location at which the contract is being performed; or

(3) A separate and complete major industrial operation connected with the performance of this contract.

(c) If the Contractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the Government through purchase or use of the supplies required to be delivered under this contract, the Contractor shall be liable to the Government, to the extent of such insurance or reserve, for loss of or damage to property of the Government occurring after Government acceptance of,

and resulting from any defects or deficiencies in, the supplies delivered under this contract.

(End of clause)

[(FAC) 90-29, (FAR) Case 94-770, Item III, 60 Fed. Reg. 34762, July 3, 1995; (FAC) 90-40, (FAR) Cases 94-770, 94-771, Item II, 61 Fed. Reg. 39190, July 26, 1996; (FAC) 90-43, (FAR) Case 92-035, Item XII, 61 Fed. Reg. 67426, Dec. 20, 1996]

48 C.F.R. § 52.246-24. Limitation of Liability—High-Value Items.

As prescribed in 46.805, insert the following clause:

LIMITATION OF LIABILITY—HIGH-VALUE ITEMS (FEB 1997)

(a) Except as provided in paragraphs (b) through (e) below, and notwithstanding any other provision of this contract, the Contractor shall not be liable for loss of or damage to property of the Government (including the supplies delivered under this contract) that (1) occurs after Government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies.

(b) The limitation of liability under paragraph (a) above shall not apply when a defect or deficiency in, or the Government's acceptance of, the supplies results from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel. The term "Contractor's managerial personnel," as used in this clause, means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of—

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operations at any one plant, laboratory, or separate location at which the contract is being performed; or

(3) A separate and complete major industrial operation connected with the performance of this contract.

(c) If the Contractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the Government through purchase or use of the supplies required to be delivered under this contract, the Contractor shall be liable to the Government, to the extent of such insurance or reserve, for loss of or damage to property of the Government occurring after Government acceptance of, and resulting from any defects or deficiencies in, the supplies delivered under this contract.

(d)(1) This clause does not diminish the Contractor's obligations, to the extent that they arise otherwise under this contract, relating to correction, repair, replacement, or other relief for any defect or deficiency in supplies delivered under this contract.

(2) Unless this is a cost-reimbursement contract, if loss or damage occurs and correction, repair, or replacement is not feasible or desired by the Government, the Contractor shall, as determined by the Contracting Officer—

(i) Pay the Government the amount it would have cost the Contractor to make correction, repair, or replacement before the loss or damage occurred; or

(ii) Provide other equitable relief.

(e) This clause shall not limit or otherwise affect the Government's rights under clauses, if included in this contract, that cover—

(1) Warranty of technical data;

(2) Ground and flight risks or aircraft flight risks; or

(3) Government property.

(This clause shall apply only to those items identified in this contract as being subject to this clause.)

(End of clause)

Alternate I (APR 1984). If the contract is for both high-value items and other end items, the contracting officer shall identify the high-value items by line item and insert the following preamble before paragraph (a):

(This clause shall apply only to those items identified in this contract as being subject to this clause.)

[(FAC) 90-29, (FAR) Case 94-770, Item III, 60 Fed. Reg. 34762, July 3, 1995; (FAC) 90-40, (FAR) Cases 94-770, 94-771, Item II, 61 Fed. Reg. 39190, July 26, 1996; (FAC) 90-43, (FAR) Case 92-035, Item XII, 61 Fed. Reg. 67426, Dec. 20, 1996]

48 C.F.R. § 52.246-25. Limitation of Liability—Services.

As prescribed in 46.805, insert the following clause:

LIMITATION OF LIABILITY—SERVICES (FEB 1997)

(a) Except as provided in paragraphs (b) and (c) below, and except to the extent that the Contractor is expressly responsible under this contract for deficiencies in the services required to be performed under it (including any materials furnished in conjunction with those services), the Contractor shall not be liable for loss of or damage to property of the Government that (1) occurs after Government acceptance of services performed under this contract and (2) results from any defects or deficiencies in the services performed or materials furnished.

(b) The limitation of liability under paragraph (a) above shall not apply when a defect or deficiency in, or the Government's acceptance of, services performed or materials furnished results from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel. The

term "Contractor's managerial personnel," as used in this clause, means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of—

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operations at any one plant, laboratory, or separate location at which the contract is being performed; or

(3) A separate and complete major industrial operation connected with the performance of this contract.

(c) If the Contractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the Government through the Contractor's performance of services or furnishing of materials under this contract, the Contractor shall be liable to the Government, to the extent of such insurance or reserve, for loss of or damage to property of the Government occurring after Government acceptance of, and resulting from any defects and deficiencies in, services performed or materials furnished under this contract.

(End of clause)

[(FAC) 90-29, (FAR) Case 94-770, Item III, 60 Fed. Reg. 34762, July 3, 1995; (FAC) 90-40, (FAR) Cases 94-770, 94-771, Item II, 61 Fed. Reg. 39190, July 26, 1996; (FAC) 90-43, (FAR) Case 92-035, Item XII, 61 Fed. Reg. 67426, Dec. 20, 1996]

48 C.F.R. § 252.228-7001. Ground and flight risk.

As prescribed in 228.370(b), use the following clause:

Ground and Flight Risk (SEP 1996)

* * * *

(b) Except as may be specifically provided in the Schedule as an exception to this clause, the Government assumes the risk of damage to, or loss or destruction of aircraft in the open, during operation, and in flight. The Contractor shall not be liable to the Government for such damage, loss, or destruction.

* * * *

(End of clause)

[56 Fed. Reg. 67221, Dec. 30, 1991; (DAC) 91-11, 61 Fed. Reg. 50456, Sept. 26, 1996]